MOTION FILED
AUG 25 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978
No. 78-1588

CAROL VANCE, et al.,

Appellants,

v.

UNIVERSAL AMUSEMENT CO., INC., et al.,

Appellees.

GEORGE E. McCREA, et al.,

Appellants,

v.

KING ARTS THEATRE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF CHARLES H. KEATING, JR., FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANTS, WITH BRIEF ANNEXED.

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Appellees.

GEORGE E. McCREA, et al.,
Appellants,
v.
KING ARTS THEATRE, INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF CHARLES H. KEATING, JR., FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANTS, WITH BRIEF ANNEXED.

Charles H. Keating, Jr., (hereinafter referred to as Moving Party) respectfully moves, pursuant to Rule 42(3) of the Rules of the United States Supreme Court, for leave to file a brief as amicus curiae in support of the Appellants herein. The consent of the Appellants has been

obtained and has been filed with this Court. The consent of Mr. Frierson H. Graves, Jr. counsel for Appellees, Universal Amusement Co. Inc. and King Arts Theatre Inc., was requested by letter dated July 12, 1979 and was declined by his letter dated July 16, 1979.

Moving party has a special interest in the subject of this appeal, both as a member of the Presidential Commission on Obscenity and Pornography and author of one of the dissenting reports of that commission and as the founder and co-counsel for "Citizens for Decency Through Law Inc." (short title "CDL"). In my dissenting Commission report, I noted that "there was a trend developing which treats obscenity as nothing more than an ancient common law scourge whose remedy lies in 'abatement' as a common law nuisance."[1/] For the past ten years, CDL attorneys have assisted law enforcement in the development of this public nuisance concept and, based upon that experience, hold the opinion that state public nuisance statutes, like the Texas statute involved in this appeal, offer the most effective vehicle for attacking the obscenity problems that plague this nation.

1/ See, The Report of the Commission on Obscenity and Pornography, September 1970, at pages 605-609.

Progress in that direction in the State of Texas has been blocked for the past six (6) years by the federal interference herein under review.

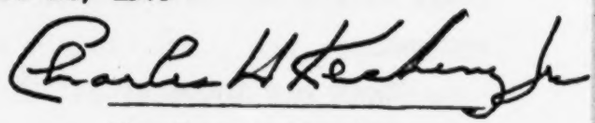
There are three areas of concern [2/] which give moving party reason to believe that relevant "facts or questions of law will not adequately be presented by the parties": (1) the suggestion which is implied in the jurisdictional statement that the public nuisance remedy "presents a dubious tool for the control of obscenity," (2) the narrow framework of facts in the record - or rather, the lack of the same - within which the three major issues are being presented to this Court, and (3) Appellant's avoidance of the abstract question whether "closure" and its alternative bond requirement can ever be applied by a Texas Court as an equitable remedy in a proper case.

Moving party believes that the arguments presented in the Amicus Brief which is annexed may not be fully discussed in the appellant's brief on the merits and, therefore, respectfully requests that he be granted leave to file a brief amicus curiae setting forth the

2/ See "Interest of Amicus Curiae" at page 3 of the amicus curiae brief which is annexed hereto.

same, for such assistance as they may provide to the individual justices sitting herein.

Dated: August 24, 1979



Charles H. Keating, Jr.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978
No. 78-1588

CAROL VANCE, et al.,
Appellants,

v.

UNIVERSAL AMUSEMENT CO., INC., et al.,
Appellees.

GEORGE E. McCREA, et al.,
Appellants,

v.

KING ARTS THEATRE, INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF CHARLES H. KEATING, JR., IN SUPPORT OF APPELLANTS.

INTEREST OF AMICUS CURIAE

Amicus Curiae has a special interest in the subject of this appeal, both as a member of the Presidential Commission on Obscenity and Pornography and author of one of the dissenting

reports of that commission,[1] and as the founder and co-counsel for "Citizens for Decency Through Law Inc." (short title "CDL"). In my dissenting Commission report I noted that "there was a trend developing which treats obscenity as nothing more than an ancient common law scourge whose remedy lies in 'abatement' as a common law nuisance."[2] For the past ten years,

1/ See, The Report of the Commission on Obscenity and Pornography, September 1970, at pages 513-628.

2/ Id. at 605-609. The two principal Ohio public nuisance abatement cases relied upon in that report, have since been affirmed on appeal. State of Ohio ex rel. Keating v. A Motion Picture Film Entitled "Vixen" et al., 27 Ohio St.2d 278, 56 Ohio Ops.2d 165, 272 N.E.2d 139, vacated and remanded on other grounds in A Motion Picture Film Entitled "Vixen" et al. v. Ohio ex rel. Keating (71-599) 413 U.S. 905, 37 L.Ed.2d 1016, 93 S.Ct. 3033 (June 25, 1973), opinion adhered to on remand in 35 Ohio St. 2d 215, 301 N.E.2d 880; Ohio ex rel. Ewing v. Art Theatre Guild Inc. ("Without A Stitch") 37 Ohio St.2d 95, 307 N.E.2d 911 (Feb. 27, 1974), appeal dismissed for want of a substantial federal question in Art Theatre Guild Inc., et al., v. Ohio ex rel. Ewing (No. 73-1973) 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (Apr. 21, 1975). The underlying principles expressed in the two California cases noted in such report, Weis v. Superior Court of San Diego County, 30 Cal.App. 730, 159 P.464 (June 14, 1916) and People v. Lim, 18 Cal.2d 872, 118 P.2d 472 (Nov. 27, 1941) have since provided the legal precedent for

CDL attorneys have assisted law enforcement in the development of this public nuisance concept and, based upon that experience, hold the opinion that state public nuisance statutes, like the Texas statute involved in this appeal, offer the most effective vehicle for attacking the obscenity problems that plague this nation. Progress in that direction in the State of Texas has been blocked for the past six (6) years by the federal interference herein under review.

There are three areas of concern which give moving party reason to believe that relevant "facts or questions of law will not adequately be presented by the parties": (1) the suggestion which is implied in the jurisdictional statement that the public nuisance remedy "presents a dubious tool for the control of obscenity," (2) the narrow framework of facts in the record - or rather, the lack of the same - within which the three major issues are being presented to this Court, and (3) Appellant's avoidance of the abstract question whether "closure" and its alternative bond requirement can ever be applied

the California Supreme Court's decision upholding the constitutionality of the California public nuisance abatement statute. People ex rel. Busch et al. v. Projection Room Theater, 17 Cal.3d, 42, 130 Cal.Rptr. 328 (June 1, 1976).

by a Texas court as an equitable remedy in a proper case.

As to the first area of concern, it is respectfully submitted that the "dubious tool" remark in the jurisdictional statement was written in haste and without proper reflection on what is at stake. That analysis focuses too sharply on the injunctive aspect and fails to perceive this common law remedy as the special type of equitable lawsuit that it has become. The "public nuisance" concept should be appraised in a different light than merely an "injunctive" tool. It is an ancient common law remedy which, in a proper case such as where the criminal remedy is inadequate, fills the gap and provides government with a host of other potential legal and equitable weapons; namely, (1) tort damages, both compensatory and punitive, and (2) other equitable remedies, such as a constructive trust of moneys derived from unlawful conduct, forfeitures, an equity court's historic powers to award attorney's fees where conduct is malicious, and to reform real property where it has acquired a public reputation as a per se moral public nuisance. Specific relief using the public nuisance civil lawsuit can be obtained in the courtroom, either by virtue of judicial gloss on existing civil

public nuisance abatement statutes, Trans - Lux Corp. v. Alabama ex rel. Sweeton, 366 So.2d 710, 174, (January 19, 1979); People ex rel. Busch et al. v. Projection Room Theatre et al., 17 Cal.3d 42, 130 Cal.Rptr. 328 (June 1, 1976); In re Ward, 82 Cal.App.3d 974, 147 Cal.Rptr. 476 (July 20, 1978), or thru special legislation mandating specific relief on the subject matter. For example, see Chapters 1 and 4, Title 52 of the Idaho Code; R.C.W. sections 7.48.050-900; Chapter 19 of North Carolina General Statutes; Arizona Revised Statues, sections 12-811 through 12-818. A copy of the Idaho, Washington, North Carolina and Arizona statutes is attached to this brief as appendix A.[3/]

As to the second area of concern, moving party submits that the record upon which the Court of Appeals reached its decision is incomplete, abstract, and in such a complete state of disarray that it may have ceased to provide this Court with a proper "case or controversy" within the meaning of Article III of the federal constitution or an "actual controversy" within the meaning of the declaratory judgment act. The

3/ In drafting its blueprint, this Court has often seen fit to refer to other legislative patterns. See Miller v. California, 413 U.S. 15, 35 L.Ed.2d 419, 93 S.Ct. 2607 at page 430, footnote 6.

Vance case was originally filed in November 1973. Like Topsy, it grew and grew, until finally in 1975 it was tried in the federal district court as a consolidated case involving 20 different factual situations spread out over the entire state of Texas. (The Northern, Southern, Eastern and Western District of the U.S. District Court for Texas.) Then, in its succeeding four years on appeal it has collapsed and shrunken to an en banc review wherein the 3 major legal issues were resolved in the background of one abstract declaratory judgment action, filed in November 1973, King Arts v. McCrea. See 587 F.2d at 162 fn. 1. One of the factors which should have provided the en banc majority below with a 1973 answer to one of their objections re Texas procedure, is not now the law, having been repealed in January 1974. See footnote 4 at page 18. For example, the en banc dissent below paraphrased one of the majority's procedural "safeguards" at 587 F.2d 176 as:

> "To apply, their rule must be rewritten to run as follows: where a preliminary judicial decision resulting from an adversary hearing has been made that matter is probably obscene and should be taken off the market pendente lite, a procedural scheme - to be valid as applied to pornography - must further require that the judge conduct a prompt hearing on the merits of obscenity and render a prompt final judgment on it as well."

Yet, that very "safeguard" existed at the time King Arts v. McCrea was filed, in the special Texas search warrant procedure, Article 527 Sections 9(g) and 9(h) (See appendix E-3) which then controlled the multiple seizures of "Deep Throat" which the federal trial court was so concerned about, see 404 F.Supp. 33 at 37, and should have disposed of that issue in the case in 1973, had it been heard by the federal court in a timely fashion.

The federal action below stopped a number of state actions during the period 1973-1975 which, if permitted to proceed to trial, would have brought about an authoritative state court construction and would have placed upon the Texas public nuisance statute the "gloss" which the Court of Appeals below confessed it had no jurisdiction to impart. See 587 F.2d 159 at 172. U.S. v. 37 Photographs, 402 U.S. 363, 369, 28 L.Ed.2d 822, 830, 91 S.Ct. 1400 (May 3, 1971). Compare the Texas result with the result reached in California in People ex rel. Busch et al. v. Projection Room Theater et al., supra; and In re William Ward, 82 Cal.App.3d 974, 147 Cal.Rptr. 476 (July 20, 1978). Where a state statute can be rendered consistent with constitutional

principles by further state court interpretation, as a public nuisance statute assuredly can, the federal court is required to leave that matter for decision by the state forum. Railroad Commissioner v. Pullman Co., 312 U.S. 496, 85 L.Ed.2d 971, 61 S.Ct. 643.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas, Houston Division, (Before Ingraham, Circuit Judge, and Singleton and Taylor, District Judges) was filed on July 3, 1975 and is reported in Universal Amusement Co., Inc., et al. v. Carol Vance et al., (Civ A. No. 73-H-528), 404 F.Supp. 33.

The opinion of the United States Court of Appeals, Fifth Circuit (Before Thornberry, and Gee, Circuit Judges and Markey, Chief Judge) was filed on September 28, 1977 and is reported in Universal Amusement Co., Inc., et al. v. Carol Vance et al., ect., 559 F.2d 1286.

On rehearing En Banc, the opinion of the United States Court of Appeals, Fifth Circuit (Before Brown, Chief Judge, Thornberry, Coleman, Goldberg, Ainworth, Godbold, Clark, Roney, Gee, Tjoflat, Hill, Fay, Rubin and

Vance, Circuit Judges) was filed on December 18, 1978 and is reported in Universal Amusement Co., Inc., et al. v. Carol Vance et al., and King Arts Theatre Inc., v. McCrea, 587 F.2 159.

STATEMENT OF JURISDICTION

Jurisdiction in the federal district court was based on 28 U.S.C. section 1343, 42 U.S.C. section 1983, and 28 U.S.C. section 2201 (declaratory judgments).

The jurisdiction of this Court rests on 28 U.S.C. section 1254(2).

QUESTIONS PRESENTED FOR REVIEW

1. Whether Article 4667(a)(3) of the Revised Civil Statutes of Texas, which declare the habitual use of any place for the commercial manufacturing, commercial distribution, or commercial exhibition of obscene materials shall constitute a public nuisance, which shall be enjoined at the suit of either the State or any citizen, was constitutional on its face.

2. Whether article 4666 when read in conjunction with article 4667 (a)(3) of the Revised Civil Statutes of Texas, was susceptible of further interpretation by the Texas State Court which would render it constitutional, and if so, whether in advance of that construction, a federal court has the authority to undertake that con-

struction.

3. Whether article 4667(a)(3), as interpreted by the decisional law of the Texas Court of Civil Appeals in Richards v. State and Locke v. State to authorize the issuance of an injunction against the future exhibition of unnamed obscene films that depict particular acts enumerated in the Texas obscenity statute, was unconstitutional as a prior restraint on materials not yet declared obscene.

4. Whether the Texas injunction procedures, which authorize a temporary injunction to be obtained against obscene materials as an ancillary remedy in conjunction with the Texas public nuisance statute, Article 4667(a)(3) of the Revised Civil Statutes of Texas, was constitutionally infirm for its failure to provide the procedural safeguards set forth in Freedman v. Maryland.

STATEMENT OF THE CASE

Shortly after this Court decided the Miller Quintet of cases in June of 1973, the Court of Civil Appeals of Texas, Beaumont, decided Richards v. Texas, 497 S.W.2d 770, an injunctive action brought under Texas Penal Code Article 527 section 13. (See Appendix E-5 to this brief). In granting equitable

relief and upholding an injunction which enjoined the defendants from:

> "(a) exhibiting or distributing 9 specific films, and (b) exhibiting or selling any other films which show actual acts of fellatio, cunnilingus, actual oral genital contact between two or more males or females, any sexual intercourse between human and animal or between human males and females, and which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have any serious literary, artistic, political, or scientific value,"

the Texas Court equated the defendants' conduct to that of a "public nuisance" and justified such relief under his authority to grant equitable relief as to that type of conduct.

At or about the same time, the prosecution of obscenity connected activities mushrooned all over the state of Texas (including a major effort to halt the exhibition of "Deep Throat") with law enforcement using the civil approach which had been upheld in Richards, supra, as well as prosecution under the criminal statutes. The defendants countered by filing civil rights and declaratory judgment lawsuits in the federal district courts, seeking to enjoin the state court law enforcement actions, and to obtain a declaratory judgment that the Texas statutes and their application by law enforcement were

unlawful.

Concurrently, (January 1, 1974) the Texas Penal Code was amended in its entirely. Thereafter, instead of pursuing an authoritative interpretation of the new Texas statutes in the state courts, the defendants continued filing civil rights and declaratory judgment actions in the federal courts throughout the state of Texas, asking those federal courts for an interpretation of the state statutes. Finally, the Fifth Circuit Court of Appeals ordered 20 of the cases consolidated for a hearing in the Houston District Court by a Three-Judge panel.

The federal court system did not decide those cases promptly. Although the record in the consolidated case was compiled by stipulation and did not involve a factual trial, as such, the decision of the trial court in the consolidated case was not filed until 18 months after the first federal action was filed. The first Court of Appeals decision (three judges) was not filed until 30 months later, and the second Court of Appeals decision (en banc) was not filed until 15 months after the first filing.

Although the change in the law of public nuisance, which prompted the federal lawsuits,

had only recently been enacted by the state legislature (in January 1, 1974), the federal judiciary did not defer to the state judiciary for an "authoritative interpretation" but elected themselves, instead, to give that legislation its first interpretation. The statutory interpretations given by the federal judiciary to the Texas public nuisance statute were not in agreement. Not only did each successive panel on the Court of Appeals disagree with the trial court interpretation, but the panels themselves disagreed, as did the judges on the same panel.

The record in the case on review, King Arts Theatre v. McCrea, shows that the federal action was filed by the theater under the civil rights and declaratory judgment statutes after receiving a letter from the landlord that the lease was being terminated to avoid the inconvenience and embarrassment of joinder as a defendant in a suit to enjoin the showing of pornographic films. 559 F.2d 1289 at footnote 2; 587 F.2d at 163, footnote 3. The trial court's finding that "the landlord was terminating King Arts lease' at the suggestion' of the county attorney" is not supported by the record, but was not challenged by the parties on appeal.

The principal issues are: (1) whether the record on appeal in Kings Arts Theater v. McCrea,

presents a proper "case or controversy" within the meaning of Article III of the federal constitution, or an "actual controversy" within the meaning of the declaratory judgment act; (2) whether the Texas public nuisance statute, article 4667(a)(3) of the Revised Civil Statutes of Texas, was facially constitutional; and if so, (3) whether, in view of U.S. v. 37 Photographs, supra, the federal district court had jurisdiction to "authoritatively interpret" the recently enacted Texas civil public nuisance statute.

STATEMENT OF FACTS

On July 2, 1973, the Court of Civil Appeals of Texas in Beaumont decided Richards v. Texas, 497 S.W.2d 770 wherein that Court granted injunctive relief under the authority of Art. 527 section 13, Vernon's Penal Code (1972 Supp). A copy of Texas Penal Code article 527 section 13 is attached to this brief as Appendix "E". The cause had been tried to a jury and submitted on oral arguments on June 20, 1973, one day before this Court's decisions in Miller v. California, 413 U.S. 15 and its companion cases. See 497 S.W.2d at 772. The jury found that 9 specific films were obscene and that the defendants knowingly permitted the distribution

of such films. The trial court enjoined the defendants from: (1) exhibition and distribution of the specific films (2) exhibition and distribution of any other obscene material as defined in Article 527 of the Texas Penal Code, and (3) exhibiting or selling any other films which show actual acts of fellatio, cunnilingus, sexual intercourse etc.

In its July 2, 1973 decision in Richards v. Texas, supra, the Court of Civil Appeals affirmed the first part of the injunction, struck the second part as failing to provide proper guidelines under applicable State statutes, and modified the third part under what the Court considered to be the explicit holding of Miller, supra, by adding a sentence reading "The injunction granted by this paragraph of the order is limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have any serious literary, artistic, political, or scientific value." In explaining its authority under Article 527 section 13 (See Appendix E-5 infra), the Court of Civil Appeals likened the defendants' conduct to that of a public nuisance and stated that in such cases, "equity has been able to fashion the remedies necessary to the public

welfare," at page 780:

> ". . . Historically, in other areas of the law than pornography, equity has been able to fashion the remedies necessary to the public welfare. Thus, if we liken defendants' conduct to that of a public nuisance, there would be no obstacle to equity enjoining its continuance. See the long line of cases cited in Lowe, 6 Texas Practice, Remedies §33, p. 61 (2d Ed. 1973). We are unwilling to hold that there is no method which can be found to stop conduct of parties such as shown by our record."

At or about the same time, hard core films such as "Deep Throat" and "Devil in Miss Jones" invaded the State of Texas. State law enforcement brought both criminal prosecutions and equitable actions under Article 527 section 13 in an attempt to stop that conduct as a public nuisance. The pornography industry countered by filing civil actions in the federal district court under the civil rights act, 42 U.S.C. section 1983, and the declaratory judgment statute, 28 U.S.C. section 2201, all of which cases were set before three-judge Courts. What happened after this Court's decision in Miller, supra, and the Texas State Court decision in Richards is explained in U.S. District Judge Singleton's opinion in 404 F.Supp. 33 at 37. (July 3, 1975):

> ". . . the prosecution for alleged obscenity-connected activites mushroomed all over the state of Texas. Each time a defendant would seek to have his obscenity prosecution enjoined in a federal court in Texas, Chief Judge John R. Brown would consolidate such case with the instant three-judge case. A full list of all of the cases can be found in an appendix to this opinion."3a/

3a/ The collateral attack in the federal court on State law enforcement efforts involved the following cases:

NORTHERN DISTRICT

1. Jones v. Dyson CA-3-7024-N/D.
2. Associated Theatres v. Dyson CA-3-7398-N/D.
3. Associated Theatres v. Wade CA-3-7347-N/D.
4. Ellwest Theatres v. Walls CA-4-74-45-N/D.
5. Cinema X v. Curry and Walls CA-4-74-28-N/D.
6. Carson v. Baily CA-7-74-65-N/D.
7. Claybrook v. Baily CA-7-74-43-N/D.
8. Lovely v. Driver CA-7-74-45-N/D.
9. King Arts v. McCrea CA-6-345-N/D. (San Angelo)
10 Ellwest v. Byrd CA-3-74-130-E N/D.

SOUTHERN DISTRICT

1. Universal Amusements v. Vance C.A. 73-H-528 S/D. (Houston)
2. Hargrove v. Hill C.A. 73-H-1114 S/D. (Houston)

EASTERN DISTRICT

1. Sun Family Entertainment v. Hanna B-74-142 C.A. E/D. (Beaumont)

WESTERN DISRTICT

1. Southland Theatres v. Butler S.A.-73-CA-214 W/D. (San Antonio)
2. San Antonio Bookmart v. Smith A-74-CA-078 W/D.
3. Wells v. Miles A-74-CA-189-W/D
4. Cook v. Peters S/A-74-CA-176 W/D (San Antonio)
5. McKenzie v. Butler S/A-74-CA-35-W/D. (San Antonio)
6. Gernon v. Simpson A-75-CA-34 W/D
7. Dexter v. Butler SA-74-CA-168 W/D (San Antonio)

"On August 12 the managing judge of this three-judge court, Honorable John V. Singleton, held a pretrial conference at which attorneys representing all of the parties in each of the cases then consolidated appeared.

"The cases, as they were consolidated into the original case, presented a variety of challenges to Texas statutes. Not only was the constitutionality of the substantive obscenity statutes challenged but also the use of statutes allegedly designed for purposes other than the closing down of purported commercial obscenity was challenged, as were the old and new public nuisance statutes used to abate the alleged public nuisance of commercial obscenity. Finally, the law on obscenity had changed. In June of 1973, the Supreme Court decided the Miller quintet."

". . . The Texas obscenity laws, too, had changed. (4/) On January 1, 1974,

(4/) The Texas penal laws were changed on January 1, 1974. On that date, Acts 1973, 63rd Legislature p. 883, chapter 399 became law and brought about the following changes:

(1) Section 1 enacted into law a new Texas Penal Code. Section 3(a) thereof repealed articles of the Texas Penal Code of 1925 and Vernon's Texas Penal Code, as amended.

(2) Sections 2(A) through 2(E) amended certain articles of the Code of Criminal Procedure, 1965,

(3) Sections 2(F) through 2(J) amended certain articles of the Revised Civil Statutes of Texas, 1925,

(4) Sections2(K) and 2(L)amended certain provisions of the Texas Business Corporation Act, and

the old article 527 was repealed, and in its place section 43.21 et seq. of the new penal code was enacted. The Texas public

(5) Sections 2(M) and 2(N) amended certain provisions of the Texas Non-Profit Business Corporation Act.

The relevant changes in the new Texas Penal Code were as follows: Chapter 43 B of the new Penal Code enacted a new law on obscenity contained in sections 43.21, 43.22, 43.23 and 43.24 of the Code. A copy of those sections is attached to this brief at Appendix B.

The relevant changes in the Code of Criminal Procedure were as follows: Chapter 18, Code of Criminal Procedure, 1965 "Search Warrants" was amended in its entirety.Article 18.02(6) specifically named obscene materials and replaced the former special Search Warrant Procedures in Penal Code Article 527 section 9. A copy of those sections is attached to this brief at Appendix C.

The relevant changes in the Revised Civil Statutes of Texas, 1925 were as follows: Article 4664 (Nuisance) and Article 4667 (Injunctions to Abate Public Nuisances) were amended. A copy of Articles 4664 through 4667 is attached to this brief at Appendix D.

The relevant changes brought about by the repeal of the Texas Penal Code were as follows:

(1) Article 527 "Obscene Articles" consisting of 13 sections, including specific legislation on search warrants (section 9) and enforcement by injunction (section 13) was repealed. A copy of article 527 is attached to this brief at Appendix (E)

Two months after Judge Singleton's decision was filed, the state legislature again amended Texas Penal Code section 43.21 (Definitions) by encorporating into Texas law, the definition for "obscene" set forth in Miller v. California, supra, a copy of which is attached at Appendix (F).

nuisance statutes, also, were changed to specifically provide for the enjoining of the use of a premises for purposes of commercial obscenity.

"In an effort to simplify the process of deciding all of these varied cases, the managing judge chose three of the cases which presented the least jurisdictional problems and also presented straightforwardly at least one of the challenges brought on by each of the remaining cases.

"On November 15, 1974, the three-judge court again convened to hear oral arguments in each of the three cases. Each of the three sets of parties had earlier submitted a joint Pretrial Order, in which material and important facts had been stipulated and briefs on the points of law involved. . ."

THE TRIAL COURT'S DECISION ON THE 20 CONSOLIDATED CASES ON JULY 3, 1975.

Judge Singleton's trial court decision, consisting of 5 parts, is reported in 404 Fed Supplement 33 and was filed one year and eight months after the first federal action was commenced. Parts 1 and 5 covered the introductory statement of facts and the conclusion, and parts 2, 3 and 4 each dealt with one of the cases which presented one of the challenges brought by each of the remaining cases. Part 2 discussed King Arts Theatre v. McCrea (CA-6-345) out of San Angelo, Tom Green County, and that plaintiff's claim that

article 4667 of Vernon's Annotated Civil Statutes was facially unconstitutional, and that Penal Code section 43.21 defining obscenity was unconstitutional. Part 3 discussed Richard Dexter v. Ted Butler, SA 74-CA-168 out of San Antonio Texas, Bexar County, and that plaintiff's claim that four successive seizures of the film "Deep Throat" and the 16 mm projector used to project the images, under four separate search warrants, was unconstitutional, and that the plaintiff's arrest on the first three occasions and charge with the "use of a criminal instrument", in violation of Penal Code section 16.01 (felony), was for purposes of harassment and in bad faith and without hope of obtaining a valid conviction. 5/ Part 4 discussed Ellwest Stereo Theatre Inc., v. Donald Byrd et al., CA-3-74-130-E

5/ Perhaps nowhere in the history of modern obscenity law is the frustration of law enforcement more poignantly expressed than in the record of Dexter v. Butler. In late 1963, District Attorney Butler of Bexar County was governed by the explicit search warrant procedures set forth in Penal Code Article 527 Section 9. (See Appendix E-). Those procedures required an adversary hearing before a search warrant could even be issued (sect. 9b, 9g), in which evidence was to be heard and a determination of probable cause made (section 9f). If "probable cause" was determined, a search warrant would issue (section 9g). Further within 10 days of the seizure, anyone claiming a right to possession could file a notice, alleging nonobscenity, and

(This footnote is continued on next page)

out of Dallas, Texas, Dallas County, and that plaintiff's claim that two successive seizures under search warrants issued by a justice

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have a hearing on the merits within one day of the request. On January 1, 1974, Article 527 section 9 was repealed and replaced by the general search warrant statute, Chapter 18 of the Code of Criminal Procedure (See Appendix C-1) which provided in part "18.02. A search warrant may be issued to search for and seize. . . (6) obscene materials kept or prepared for commercial distribution or exhibition, subject to the additional rules set forth by law;" When "Deep Throat" invaded San Antonio in 1974, the same was seized under a search warrant which followed the same procedures which had previously been employed under Penal Code article 527. The issuing magistrate who viewed the film at the adversary hearing also authorized the seizure of the 16mm projector under the search warrant. Because a film print cannot be viewed without a projector, the issuing judge could have concluded that seizure was authorized by new article 18.02(2) and (9). See Appendix C-2. See also 404 F.Supp. 33 at 55 in the Ellwest Stereo Theater case reading: "It is obvious that article 18.02 (2) was written as a companion to section 16.01 of the new penal code which we dealt with above in the Dexter case." Should not the issuing magistrate have been asked for an authoritative state court interpretation?

A search warrant proceedings is nothing less than a separate judicial procedure in a state court, out of which a judicial order issues directing the applicant to go out and seize the specifically identified subject matter and hold it in the applicant's possession on behalf of, and pending further proceedings by the issuing magistrate.

The seized subject matter is considered to be in custodia lex. Under Texas Procedure, the person from whom the film had been taken, had the right within 10 days to have

of the peace pursuant to section 18.02(2) of the Texas Code of Criminal Procedure on January 24, 1974 (under which the police seized three films and three film projectors) and on January 29, 1974 (under which the police seized two films, two film projectors, two stools and two walls which formed two viewing booths) were unlawful as to the equipment and materials used for the exhibition. The court ruled for the plaintiff in all three cases.

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a hearing on the merits in such ancillary state court proceedings. Under Younger v. Harris 401 U.S. 37, it would appear that, since a State Court Judge had made a preliminary finding, Dexter should have been required to proceed in the state court on the merits before showing Deep Throat a second time. Are only prosecutors bound by Judicial Decisions after adversary hearings? If Dexter were so required, then a seizure under the second and subsequent search warrants was reasonable. See also Miranda v. Hicks, 422 U.S. 332. Judge Singleton thought otherwise, and held those attempts to be in bad faith, and the District Attorney liable for attorney fees. Bexar County District Attorney Butler's attempt to cut through this 6 year morass, using a direct appeal to this court, was unsuccessful. See Butler v. Dexter, 425 U.S. 262, 47 L.Ed.2d 74, 96 S.Ct. 1527. On a petition for writ of certioroi this past term, he was also unsuccessful. See Butler v. Dexter, No. 78-1428, petition for certiorari denied. 39 C.C.H. S.Ct. Bulletin at p. 3018. When District Attorney Butler was nominated for a federal judgeship, his appointment was blocked and defeated because of his law enforcement attempts to stop the exhibition of "Deep Throat" in San Antonio! It is worth commenting upon, in this note of frustration, that each and every state court judge in each state Supreme Court (8) which has considered the film "Deep Throat" on the merits, has held it to be obscene under state law.

THE TRIAL COURT'S DECISION IN THE LEAD CASE, KING ARTS THEATRE INC., v. MCCREA.

The facts in King Arts Theatre Inc., v. McCrea, are described by Judge Singleton in 404 F.Supp. at p. 38 as follows:

> "King Arts Theatre, Inc., was operating an adults-only, enclosed motion picture theatre in San Angelo, Texas. The theater showed sexually explicit films. On October 30, 1973, the landlord, from whom the theater building was rented, notified King Arts Theatre, Inc., that, at the suggestion of George E. McCrea, the county attorney of San Angelo, he was terminating the lease of the building as of November 15, 1973. The notice further informed the plaintiff that McCrea had contacted the landlord and told him that he intended to bring an application for an injunction to abate the theater as a public nuisance in order to prohibit the future showing of allegedly pornographic motion pictures.
>
> Plaintiff filed suit on November 12, 1973, requesting a declaratory judgment and injunctive relief. By agreement all parties have determined that the status quo will be maintained until the determination of this case."

The July 3, 1975 decision held that the inconveniences a prosecution of the nuisance statute would bring, did not constitute irreparable injury, and denied injunctive relief on that ground.

On the claim for declaratory relief, the Court held that the Texas Penal Code definition

of obscenity in Article 43.21 was not unconstitutionally vague, overbroad, or invalid because it failed to give adequate notice.

As to the claim for declaratory relief against the public nuisance statute, article 4667, the court held article 4667(a)(3) to be unconstitutional on its face for the following reasons: (1) Article 4667(a)(3) had to be considered with its companion statute article 4666, because that was the only statute under which a public nuisance action could be brought, inasmuch as the former section which authorized a public nuisance action, Penal Code article 527 section 13, had been repeated. The Court thereafter held the "closure" provision and alternative "bond" provision of Article 4666 constituted an unlawful prior restraint, because such operated to prevent the showing of motion pictures that have not been determined to be obscene.

The Court also held the statute failed to provide the "procedural safeguards" set forth in Freedman v. Maryland, 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734 because, under the Texas injunction procedures, a preliminary injunction could be issued on probable cause, and there was no specific provision for a swift final adjudication on the merits of the obscenity question thereafter. Judge Singleton specifically dis-

agreed with the validity of the injunction granted in Richards v. Texas, supra, which authorized the issuance of an injunction against the future exhibition of unnamed obscene films that depicted the particular patently offensive acts enumerated in the Texas obscenity statute. See 404 Fed. Supp. at 44.

THE FIRST COURT OF APPEALS' DECISION (3 JUDGES) ON SEPTEMBER 28, 1977.

Two years and 2 months later, the Court of Appeals, in a 2-1 split vote, decided the appeals in two of the above cases Universal Amusements Co., Inc., v. Vance, Dexter v. Butler and Southland Theatres Inc., v. Butler, 559 F.2d 128 (September 28, 1977). The majority opinion, written by Justice Gee and concurred in by Chief Judge Markey, was divided into three parts. Part 1 discussed Kings Arts Theatre Inc., v. McCrea, Part 2 discussed Dexter v. Butler, and Part 3 discussed the award of attorney's fees. The court, after noting that King Arts Theatre did not appeal the denial of the injunction or the decision on obscenity, reversed King Arts Theatre v. McCrea, but affirmed Dexter v. Butler.

THE FIRST COURT OF APPEALS' DECISION (3 JUDGES) IN KING ARTS THEATRE INC., v. MCCREA ON SEPTEMBER 28, 1977.

Judge Gee, with Chief Judge Markey concuring, disagreed with the district court's assessment of the state of the record; i.e., that the letter written by the landlord to the theater "was at the county attorney's suggestion." See 599 F.2d 1286 at 1289, footnote 2 reading:

> " . . . the letter states only that the termination was to avoid the inconvenience and embarrassment of joinder as a defendant in a suit to enjoin the showing of pornographic films. . ."

The majority of the Court stated as follows as to their authority to interpret the legislative intent regarding the closure and bond provisions of article 4666, and that article's relationship to article 4667(a)(3) at page 1290:

> ". . .We agree that closing a theater under article 4666 for all uses for one year - even ameliorated by the provision for reopening under bond - would pose serious first amendment questions. Such questions are not posed here, because we find article 4666's one-year closing remedy wholly inapplicable in actions such as this, since we read article 4667(a)(3)'s injunctive remedy as the exclusive procedure for abating obscene exhibitions as nuisances.
>
> We note first that apparently no reported Texas cases have applied - or discussed the application of - the one-year abatement to premises used for manufacturing,

distributing or exhibiting obscene material. We thus write on a clean slate and must determine how Texas courts would interpret these nuisance statutes. . ."

After noting that Article 4664 through 4667 had been on the statute books "since early in this century", the court proceeded to hold, as a matter of legislative interpretation, that article 4667, with the activities named therein, were not subject to the mandatory penalties of article 4666.[6/] The majority thereafter held that article 4667(a)(3)'s injunctive procedure was basically sound in its application to establishments such as King Arts Theatre, but authorized an injunction only.

The majority disagreed with the trial court's ruling regarding the "procedural safeguards" of the Texas injunctive procedures, and held them constitutional. The Court held that the Freedman v. Maryland, supra, reference to "final judicial determination" referred to determinations by an administrative board, not by a judicial body, and "does not condemn or even concern procedures as those of Texas

6/ Article 4667 had its derivation in the 1911 Texas Red Light Abatement Act which gave private citizens standing to abate houses of prostitution.

(and our) Courts by which temporary injunctions are granted or refused pending final hearings on the merits". 599 F.2d at 1293.

In his dissent, Judge Thornberry agreed with the trial court's ruling that article 4667 was facially invalid, and used strong language in dissenting from the majority's legislative interpretation that articles 4666 and 4667 were not to be read together, at page 1301 and 1302:

"In Part 1 of its opinion, the majority avoids what it admits to be 'serious first amendment questions' by creating legislative intent from non-existent legislative history and by taking an abstruse view of relevant Supreme Court cases. Because a plain reading of the applicable Texas statutes and of those cases calls for a result contary to that reached by the majority, I respectfully dissent. . ."

"In reversing the district court in King Arts Theatre, Inc., v. McCrea, the majority concludes that the one-year closing remedy provided in Article 4666 is inapplicable to obscenity and that the injunctive remedy under Article 4667 is 'the exclusive procedure for abating obscene exhibitions as nuisances.' Ante, at 1290. This strained interpretation ignores the plain language of the two statutes, and the majority is forced to support its conclusion with suppositions about what the Legislature may have intended (3/). . ."

"(fn3/) For example, the majority states that 'perhaps the legislature foresaw the constitutional implications . . . and to avoid potential trenching upon the first

amendment, chose to authorize only the lesser constraint of an injunction against future exhibitions of unprotected obscene matter . . . ." Ante at 1291. This is nothing more than conjecture, for as anyone familiar with Texas government is acutely aware, there is no such thing as a 'legislative history' for acts of the legislature."

THE COURT OF APPEALS' MAJORITY DECISION (EN BANC) IN KING ARTS THEATRE V. MCCREA ON DECEMBER 18, 1978.

One year and three months after the Court of Appeals filed its first opinion, the Fifth Circuit Court of Appeals (En Banc), in a split 8-6 vote, filed its decision in Universal Co., Inc., v. Vance and King Arts Theatre Inc., v. McCrea, 587 F.2d 159 (December 18, 1978). This time, Justice Thornberry, writing for the majority (Thornberry, Goldberg, Godbold, Clark, Roney, Hill, Fay and Rubin) reversed the three judge panel in which he had been a dissenting member and affirmed the judgment of the district court, but on a slightly different reasoning. The majority opinion, in four parts, discussed only King Arts Theatre v. McCrea.

Part 1 held that to subject the obscenity public nuisance portions of article 4667 to the "closure" and bond provision of article 4666 in accordance with the plain language

of the statutes, would render that section patently unconstitutional insofar as such pertain to obscenity. After noting that the Texas state courts had not examined the relationship between Articles 4666 and 4667, the majority construed the one-year closure remedy as inapplicable to obscenity, and held that the injunctive remedy provided in Article 4667 was the exclusive procedure for abating obscene eexhibitions as nuisances, arriving at the following result, at page 166:

". . .Thus, the one-year abatement procedure can be applied in cases of gambling, prostitution, and liquor law violations, all of which are defined as nuisances in Article 4664, but not in cases of obscenity, bull fighting, and live sex shows, which are covered only by Article 4667."

In part 2 of its opinion, the en banc majority considered the claim of King Arts Theatre that the injunction permitted by Article 4667(a)(3) was uncontitutionally deficient because the state, under the interpretation of Richards v. Texas and Locke v. Texas, can obtain an injunction that prohibits the future showing of various unnamed "obscene" films that depict particular acts enumerated in the state's obscenity statute. The en banc Court held article 4667(a)(3) to be unconstitutional "for it amounts to a prior restraint on materials not yet declared obscene.

587 F.2d at 169.

In part 3 of its opinion, the en banc court examined the claim that the "procedural safeguards" required by Freedman v. Maryland, supra, and held that Article 4667(a)(3) was unconstitutional in that regard also because:

> "The identical situation is present under the Texas injunction procedure, the hearing on the temporary injunction does not constitute an on-the-merits determination of obscenity, and there is no provision for a prompt review on the merits, and, while such a temporary injunction is in effect, the status quo is obviously altered - rather than maintained - and presumable protected speech is indefinitely suppressed."

In part 4 of its opinion, the Court held that King Arts Theatre was entitled to an award of costs and attorneys fees under 42 U.S. §1988 as the "prevailing party" and remanded the case to the district court with directions to set reasonable attorney's fees.

THE COURT OF APPEALS' MINORITY DECISION (EN BANC) IN KING ARTS THEATRE V. MCCREA ON DECEMBER 18, 1978.

The six dissenting judges (Gee, Brown, Coleman, Ainsworth, Tjoflat and Vance) agreed with the majority's legislative interpretation in Part I that articles 4666 and 4667 were not to be construed together, but dissented from parts 2 and 3 of that opinion.

In Part 2 of the dissent, the minority of the Court disagreed with the majority's holding that the injunction issued in Richards v. State, was improper. They viewed the flaw in the majority's reasoning as follows; 587 F.2d at 173:

> "In the first place, the majority's statement is simply incorrect: an injunction against exhibiting a film depicting enumerated acts from the obscenity statute suppresses that film not at all "because past films have been deemed offensive" but because the present film depicts the acts in a manner forbidden by the statute."

and that, if a criminal statute did not act as a "prior restraint" then an injunction against the same could not be so regarded, at page 174:

> "Thus if a statute forbidding publication of obscenity can be constitutionally valid, it is hard for me to see how an injunction doing the same thing is per se invalid. . ."

In Part 3 of the dissent, the minority disagreed with the majority's ruling that the Texas injunctive procedures lacked the procedural safeguards required by Freedman v. Maryland, on the ground that the Freedman safeguards referred to administrative restraints and had no application to judicial restraints. The minority pointed out that Texas Rules of Civil Procedure 680 and 681 were patterned after Federal Rule 65 and noted that the majority holding would invalidate the federal procedures in the obscenity context.

SUMMARY OF ARGUMENT

I

The suppression of nuisances which are injurious to public morality is among the most important duties of government. Article 4667(a)(3) of the civil statutes of Texas, which declares the habitual use of any place for the commercial manufacturing, commercial distribution, or commercial exhibition of obscene materials shall constitute a public nuisance which shall be enjoined at a suit of either the state or a citizen, is constitutional on its face.

Article 4667 does little more than codify the ancient Common Law Civil action to abate obscenity as a type of public nuisance. The one change that article 4667 does bring about, is to give standing to a private citizen to bring an action without being required to plead and prove "special injury."

II

Where a civil state statute is constitutional on its face and can be rendered constitutional by further interpretation by a state court, a federal court lacks jurisdiction to authoritatively construe the statute in the first instance.

Where a federal court usurps a state

court's right to construe state legislation and to function as an equity court, federal interference is jurisdictional. The narrow inquiry before the federal court is whether a state law is or can be rendered consistent with constitutional standards by further state court interpretation. For a plaintiff to succeed in challenging a state statute before a federal tribunal, he must successfully demonstrate to the federal court that no further interpretation could bring the state statute within the confines of the constitution.

The federal courts below refused to defer to the state judiciary for an "authoritative interpretation."

The Court of Appeals lacked jurisdiction in at least two instances: (1) as to the matter of legislative intent in enacting article 4667(a)(3), and the interaction of articles 4666 and 4667, and (2) the Texas equity procedures which might be available under Texas law, in the event that the Texas judiciary thought it necessary to expedite the hearing on the final injunction.

By assuming jurisdiction in the twenty cases below, the federal court has provoked a collision of principles. It was never intended that a state law enforcement officer, in the

performance of his governmental duties to carry out the abatement of moral public nuisances, should be subject to prosecution in the federal courts under the civil rights statutes, and required to pay attorney's fees to the persons responsible for the creation of the moral public nuisance.

Congress in 1871 never intended that the 1871 Civil Rights Act should be made a vehicle for converting the federal district court into a trial court for every case in which a pornographer raises a "free speech" defense in a state court action to suppress nuisances injurious to public health or morality. It was never the intent of congress that the 1871 Civil Rights Act should include conspiracies other than those showing some racial or perhaps otherwise class-based invidious discriminatory animus behind the conspiritors actions.

Sections 1985 and 1983 were enacted together as part of an integrated statutory scheme and must be read together. If it was never the intent of section 1985 to reach other than "racial, or perhaps otherwise class-based invidious discriminatory animus", then certainly the reach of 1983 is no broader and certainly does not justify making the federal district courts a trial court forum to litigate public

nuisance lawsuits, totally lacking in "racial" or "class-based invidious discriminatory animus." To construe the civil rights act as functioning differently in such a case, flies in the face of the policy related to the suppression of public nuisances, which was enunciated by the United States Supreme Court decision in Phalen v. Virginia (1850) at the time of the enactment of the Civil Rights Act.

Whatever may be the limits of "civil rights" jurisdiction, there is some point of "end" in the path where logic "seems" to point. U.S. v. 12-200 Foot Reels of Film. This court must weigh in the balance its past difficulties with federal interference in the obscenity and other areas of traditional state court activity during the past terms of court. Federal interference has caused an incredible logjam to this court's docket in the past, and federal interference in this case has effectively deprived the Texas equity courts of their jurisdiction to control moral public nuisances for six years.

III

Article 4667(a)(3) of the civil statutes of Texas is a valid application of the time-honored "nuisance" principal. The broad range of remedies which may issue out of a Texas court of equity under that principle are constitutional

as penalties for past unlawful conduct in the creation and maintenance of a place of business which is a per se moral public nuisance, and are not unconstitutional as a prior restraint because of their "chilling effect" on free speech generally.

The legal term "nuisance" embraces three different areas of the law and as many different kinds of remedies: (1) the criminal area with its remedy of the criminal penalties of fine, imprisonment, and forfeiture; (2) the civil "tort" area with its civil "damages" remedy, which awards compensatory damages for loss or harm suffered in person or property from the unlawful act, and both nominal and punitive damages where malice is also established; and (3) the equitable area with a host of equitable remedies against the "res" and persons in control thereof, such as injunction, constructive trust, destruction of the offending property and forfeiture.

In addition, a "nuisance" may be either (1) a private nuisance, (2) a public nuisance, or (3) both a private and a public nuisance, as in the case of a public nuisance which interferes with the enjoyment of land.

The law of nuisances began with the former type of redress- the private nuisance arising out

of an interest in real property. The purpose of the law was to reform the condition of the land. The Common Law remedy was limited strictly to interference with the use or enjoyment of land and was the parent of the law of private nuisance as advanced today. Paralleling the civil remedy protecting the rights on land, there developed an entirely separate principal based upon the rights of the general public in land. This principal developed as a criminal redress in a suit brought by the Crown. This "public" nuisance remained exclusively a criminal one until the sixteenth century, when it was recognized that a private individual who had suffered special damage might have a civil action in tort for the invasion of the public right.

There is a distinct difference between the concept of a civil action to abate a "private" nuisance arising out of one's ownership and real property, and the concept of a civil action to abate a "public" nuisance brought by a private person who suffers "special injury" from the public nuisance. In the former situation, the right is dependent upon one's private ownership and land, and arises out of damage to his interest in and rights arising out of the use of that land, whereas the latter orginates in a public right, is not dependent upon ownership and land

and need not consist of pecuniary damage or damage to real property, and may only consist of interference with the comfortable enjoyment of life and property.

From the earliest days of Anglo-Saxon law, a "moral" nuisance has been abatable as a public nuisance. Under the common law and the statutory law on nuisances for the state of Texas, the term "public nuisance" embraces both the "moral" public nuisance, such as the business and conduct of trading in obscenity which is offensive to the moral sense, and the "physical" public nuisance which is offensive to one of the five physical senses.

A "moral" nuisance is a "per se" public nuisance. The power to abate the same is inherent in government, which is under an obligation to remove the "moral" nuisance. This common law power to abate a public nuisance is one of the most basic powers of local government-the power possessed by municipal government in aid of its duty to protect the local community against that type of public conduct which is regarded as being malum in se. In the case of a "moral" public nuisance the obligation to remove the nuisance is limited only by the requirement that such abatement should be accomplished through the court process.

The historical background in the application of the "nuisance" concept and its remedies to the special "moral" public nuisance abatement statute involving a house of prostitution and its modern extension to a business dealing in obscenity warrants examination. The Texas Red Light Abatement Act was created in 1907, and was designed to remedy the problem of "lewdness" of a different type (but involving the same procedural problems as in the case of the obscenity "moral" nuisance). Although the 1907 Common Law Bawdy or Disorderly House "Moral" Nuisance could have been proceeded against under the Common Law and law enforcement authority regarding general public nuisances, there was little liklihood that the results which would be reached under that general statute would be consistent, or that the ends which were sought after could be uniformly achieved. The need for a special Red Light Abatement statute and remedy which would produce consistent and uniform results, was uniformly felt throughout the nation.

Today forty-one of the fifty states have a statute which employs the "Red Light Abatement" pattern of enforcement against "bawdy houses". The historical development of this type of statute has been in 3 directions: (1) a few states use statutory language which is clearly limited

to houses of prostitution and which could not be interpreted to include any form of obscenity; (2) ten states have adopted amendments and statutory language which specifically includes places dealing with obscenity in the operation of the statute; and (3) other states have used statutory language like "lewdness, assignation or prostitution" in which, by judicial decision, the term "lewdness" has been given a broad meaning, and as to which a further expansion of definition was sought which would include the "obscenity" moral nuisance. Other state have adopted special legislation on the subject, dealing specifically with the subject of obscene matter. Copies of such legislation is attached at Appendix A.

The nature and extent of the struggle by state law enforcement to reassert and reaffirm the common law public nuisance abatement approach to the "moral" nuisance of obscenity can be seen from the number of obscenity cases involving the public nuisance approach which have appeared upon the docket of the U.S. Supreme Court in recent years. (The public nuisance cases which have appeared upon the U.S. Supreme Court docket, 1972-1976 terms, are discussed herein at pages 72 through 81.) In addition the critical question as to whether or not the common law "moral" nuisance of obscenity can be reached either

through the term "lewdness" of the Red Light Abatement statutes or through the general public nuisance statutes, has become a burning issue in a number of other state cases.

The Court of Appeals below erroneously disregarded the memorandum decision of the U.S. Supreme Court in Art Theater Guild, Inc., et al., v. Ohio ex rel. Ewing, appeal dismissed for want of a substantial federal question. A review of the Ohio Supreme Court decision in Art Theater Guild, Inc., clearly shows that an order closing a theater which exhibited a single obscene motion film for a substantial period of time is constitutionally valid, at least where a good faith owner could obtain a release by (a) appearing in court, (b) filing a bond in the full value of the property, and (c) demonstrating to the court that he would prevent the nuisance from being reestablished (where the "nuisance" is regarded as being the exhibition of the particular film declared to be obscene).

The Court of Appeals opinion below holds that, under no circumstances, may a preliminary injunction or padlock penalty be issued. That result does not follow from any of this Court's decisions. It is one thing to say that an activity is "presumptively protected." It is an entirely different matter to say that the

presumption is conclusive.

An Equity Court has inherent power to enjoin the exhibition of specific sexual acts performed in the context of commercial exploitation, independent of the Miller test. See Ohio ex rel. Keating v. A Film Entitled "Vixen".

It is a fallacy to apply a rule of law which states that under no circumstances may a preliminary inuunction or padlock provision be utilized against businesses which continuously exhibit lewd conduct. Sexual intercourse performed for commercial gain, whether performed in the park or simulated on the stage or screen is in itself a form of illegal conduct. Where defendants choose to pay others to perform such conduct as a vehicle for the expression of art, it has "brigaded" the communication with conduct completely, and has subjected itself to such regulations as are appropriate to the conduct when engaged in for reasons having nothing to do with expression. There is otherwise no difference between advocacy and action. Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it.

There is no satisfactory distinction which

would justify differential treatment of the pictorial representations in obscene magazines and films on the one hand, and live performances on the other. The presentation of either may fairly be described as indecent and equally injurious to public morals.

The Legislative interpretation given to articles 4666 and 4667 is patently in error. Statutes having the same objective must be read in pari materia. Since, under Pitman v. Texas, and Articles 4666 and 4667, the "closure", bond, and preliminary injunction remedies are imposed as an "in rem" judicial remedy against the real property, rather than an "in per personam" remedy against the person, no first amendment question is presented. The rationale employed in Cincinnati Properties Inc., et al., v. Leis et al. and People of the State of California ex rel. Hicks v. "Sarong Gals" supports this proposition. The rationale expressed in Marks v. Leis and the "Sarong Gals" case is further supported by tort law principles which authorize punitive damages where a tortfeasor is guilty of "malice" in maintaining the moral nuisance.

The restraints which may be applied under articles 4666 and 4667(a)(3) of the civil statutes of Texas are "Proper Restraints." They are not

"Prior Restraints." Articles 4666 and 4667(a)(3) of the statutes of Texas which provide special legislation for the abatement of the public nuisance of commercial obscenity meet the test set forth by this court in U.S. v. O'Brien.

ARGUMENT

I

ARTICLE 4667(a)(3) OF THE CIVIL STATUTES OF TEXAS WHICH DECLARES THE HABITUAL USE OF ANY PLACE FOR THE COMMERCIAL MANUFACTURING, COMMERCIAL DISTRIBUTION, OR COMMERCIAL EXHIBITION OF OBSCENE MATERIALS SHALL CONSTITUTE A PUBLIC NUISANCE WHICH SHALL BE ENJOINED AT A SUIT OF EITHER THE STATE OR A CITIZEN, IS CONSTITUTIONAL ON ITS FACE.

A. The Suppression Of Moral Public Nuisances Is Among The Most Important Duties Of A State Government.

For over 120 years this Court has recognized the principle that the suppression of nuisances which are injurious to public morality is among the most important duties of government. In James Phelan v. Commonwealth of Virgina, 12 L.Ed.2d 1030 (1850) this Court stated at page 1033:

> "The suppression of nuisances injurious to public health or morality is among the most important duties of government . . . .
>
> "It is a principle of the Common Law, that the King cannot sanction a nuisance. . ."

B. Article 4667 Does Little More Than Codify The Ancient Common Law Civil Action To Abate Obscenity As A Type Of Public Nuisance.

With one exception, the enactment of article 4667(a)(3) on January 1, 1974 created no remedies which did not previously exist. Prior to the enactment of such legislation, the Court of Appeals in Richards v. Texas, 497 S.W.2d 770 had granted injunctive relief under Texas Penal Code Article 527 section 13. In justifying the power of a Court of Equity to act in such cases, the Court relied upon the common law power of a Court of Equity to grant injunctions to abate public nuisances. The one change that article 4667 did bring about, however, was to give standing to a private citizen to bring that action without being required to plead and prove "special injury." See Point III, infra, at p.49, for further discussion of this common law action and its modern application in the obscenity area.

II

WHERE A CIVIL STATE STATUTE IS CONSTITUTIONAL ON ITS FACE AND CAN BE RENDERED CONSTITUTIONAL BY FURTHER INTERPRETATION BY A STATE COURT, A PLAINTIFF HAS NO STANDING TO ATTACK THE SAME IN THE FEDERAL COURT ON CONSTITUTIONAL GROUNDS, AND A FEDERAL JUDGE LACKS JURISDICTION AUTHORITATIVELY TO CONSTRUE SUCH STATE LEGISLATION IN THE FIRST INSTANCE.

A. In Some Cases Federal Interference May Be Jurisdictional, As Where A Federal Court Usurpes A State Court's Right To Construe State Legislation And To Function As An Equity Court.

The Court in Stecher v. Askew, 432 F.Supp. 997 (June 7, 1977) gave expression to a principle of law which, it seems, is rarely paid attention to these days in federal court.

In the light of the Statement of Facts herein (See Statement of the Case at p.10) the Askew opinion seems particularly apposite, at page 999:

> "In determining whether plaintiff has succeeded at this task, we 'must take the statute as though it read precisely as the highest court of the State has interpreted it.' Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 273, 60 S.Ct. 523, 525, 84 L.Ed. 744 (1940). Furthermore, 'we lack jurisdiction authoritatively to construe state legislation.' United States v. Thirty-Seven Photographs, 402 U.S. 363, 369, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971). Thus we examine the Open Profanity Law as it has been interpreted in State v. Mayhew, 288 So.2d 243 (Fla. 1973). In that case the Florida Supreme Court stated that 'the language sought to be prohibited by Section 847.04, Florida Statutes, F.S.A., is that which would necessarily incite a breach of the peace.' Id. at 251. The narrow inquiry before us therefore is whether a state law prohibiting the use of 'profane, vulgar and indecent language in any public place or upon the private premises of another, so as

> to necessarily incite a breach of the peace,' is consistent with constitutional standards, or can be rendered consistent with them by further state court interpretation.
>
> ". . . For the plaintiff to succeed in this Court, he must successfully demonstrate that no further interpretation could bring this statute within the confines of the tests set out in Chaplinsky. In subsequent proceedings under this statute, however, there is absolutely no obstacle to the Florida courts' further defining the words 'necessarily incite a breach of the peace' which were incorporated into this statute by State v. Mayhew, 288 So.2d 243 (Fla.1973), as meaning 'words likely to cause an average addressee to fight.' Such construction would save the statute, and the plaintiff cannot demonstrate that the Florida courts will not so construe it." (Our emphasis).

In U.S. v. 37 Photographs, supra, 402 U.S. 363, 369, 28 L.Ed.2d 822, 91 S.Ct. 1400 (1971), this Court noted that the federal Courts "lack jurisdiction" authoritatively to construe legislation. Notwithstanding this rule as to jurisdication, which clearly precluded their ruling on the matter, see Point III (C) at p.84, the federal courts below did not defer to the state judiciary for an "authoritative interpretation," but elected themselves instead, to give the new legislation its first interpretation.

The Court of Appeals lacked jurisdiction in at least two instances: (1) as to the matter of legislative intent in enacting article 4667(a)(3),

and the interaction of articles 4666 and 4667, and (2) the Texas equity procedures which might be interpreted to be available under Texas law, in the event that the Texas judiciary thought it necessary to expedite the hearing on the final injunction. Cf. In re William Ward, 82 Cal.App.3d 981, 147 Cal.Rptr. 476 (July 20, 1978).

While a party can make a theoretical argument that the granting of temporary relief after a hearing on a preliminary injunction may ultimately result in an unlawful "prior restraint" because of conditions subsequent, he cannot use that argument where a court decides to consolidate the hearing on the preliminary injunction with the hearing on the final injunction, with the objective of granting full and immediate relief at the conclusion of the consolidated hearing. There is nothing in Texas law which would prevent a motion for a preliminary injunction, at the instance of either a plaintiff or a defendant, from being given an immediate "full blown" hearing by the trial judge, to defeat the former constitutional argument. On the contrary, it is a generally accepted principal of law that the State Courts are obliged to adapt their procedures so as to arrive at a Constitutional result. In Busch, the California Supreme Court noted, in this context, at page 336:

> "Furthermore, the United States Supreme Court recently emphasized within the foregoing context that courts have an obligation to construe statutes in such a way as to avoid serious constitutional doubts. . . ." (Our emphasis.)

and, at page 338:

> "We are obliged to construe and interpret legislation in a manner which will uphold its validity. (Citations). Thus, the courts have held that provision for a prior adversary hearing may be implied by law in otherwise silent statutory provisions."

See, for example, Rule 65(a)(2) of the Federal Rules of Civil Procedure,[7/] which provides for consolidating the hearing of an application for a preliminary injunction with the trial on the merits:

7/ Rule 65(a)(2):

> "CONSOLIDATION OF HEARING WITH TRIAL ON MERITS. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. . . ."

The Advisory Committee's Notes make this observation:

> "SUBDIVISION (a)(2). This subdivision provides express authority for consolidating the trial on the merits. The authority can be exercised with particular profit when it appears that a substantial part of the evidence offered on the application will be relevant to the trial proper. Repetition of

(This footnote is continued on next page)

Although it is recognized that the Texas statutes do not have the specific statutory language contained in Rule 65(a)(2) of the Federal Rule of Civil Procedure, Amicus submits that the authority which appears in the Federal Rules is a part of a Texas Equity Court's inherent power.

In view of the previous state court interpretations in Richards v. Texas, 516 S.W.2d 949 (December 3, 1974), the ruling of the federal courts below as to the validity of that type of injunction was not unauthorized under the rule expressed in U.S. v. 37 Photographs, supra. It would appear, however, from the factual record which is reflected in the opinions of the Court of Appeals below[8/] that such does not establish a

> evidence is thereby avoided. The fact that the proceedings have been consolidated should cause no delay in the disposition of the application for the preliminary injunction, for the evidence will be directed in the first instance to that relief, and the preliminary injunction, if justified by the proof, may be issued in the course of the consolidated proceedings. Furthermore, to consolidate the proceedings will tend to expedite the final disposition of the action. It is believed that consolidation can be usefully availed of in many cases. . . . The subdivision is believed to reflect the substance of the best current practice and introduces no novel conception." (Our emphasis.)

8/ See Statement of the Case, supra, at page 13.

"case or controversy" which would warrant an expression from the federal court. The trial facts do not demonstrate that the plaintiff below, Kings Arts Theatre Inc., has pleaded a cause of action upon which relief can be granted. See State Cinema of Pittsfield v. Ryan, 303 F.Supp. 579, affd. in 422 F2 1400 (March 27, 1970), cert. denied in State Cinema of Pittsfield Inc., v. Ryan, No. 318, 400 U.S. 850, 27 L.Ed.2d 87, 91 S.Ct. 51 (October 12, 1970).

B. By Assuming Jurisdiction In The 20 Cases Below, The Federal Courts Below Have Provoked A Collision Of Principles.

It was never intended that a state law enforcement officer, in the performance of his governmental duties to carry out the abatement of moral public nuisances, should be subject to prosecution in the federal courts under the civil rights statutes, and required to pay attorney fees to the persons responsible for the creation of the moral public nuisance.[9/]

9/ See footnote 5, supra. As Justice Rehnquist has recently noted in a California case involving the exclusionary rule: "While it is quite true that courts are not to be participants in 'dirty business', neither are they to be ethereal vestal virgins of another world."

By entertaining, "jurisdiction" in the 20 cases below, the federal courts have incited a collision between two basic powers.

Amicus submits that the legislative history, reviewed by this Court in Griffen v. Breckenridge, 403 U.S. 88, 29 L.Ed.2 388, 91 S.Ct. 1790 (June 7, 1971) surrounding the 1871 enactment, indicates that Congress in 1871 never intended the 1871 Civil Rights Act should be made a vehicle for converting the Federal District Court into a trial court for every case in which a pornographer raises a "free speech" defense in a state court action to suppress nuisances injurious to public health or morality.

This court cannot avoid the implications of its rationale in Griffen v. Breckenridge, 403 U.S. 88, 29 L.Ed.2d 338, 91 S.Ct. 1790 (June 7, 1971) where, in upholding federal jurisdiction under the conspiracy section of the Civil Rights Act of 1871, in the case of conspiracies of private individuals to deprive the plaintiffs of civil rights involving racial discrimination, (43 USC Sect. 1985) Justice Stewart was required to examine the congressional purpose behind such legislation and concluded that it was never the intent of Congress that the act should include conspiracies other than those showing some racial or perhaps otherwise class-based invidious dis-

criminatory animus behind the conspirators' actions, at page 348:

> "It is thus evident that all indicators - text, companion provisions, the legislative history - point unwaveringly to 1985(3)'s coverage of private conspiracies. That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. For, though the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, 'that Congress has a right to punish an assault and battery when committed by two or more persons within a State.' Id. at 485. The constitutional shoals that would lie in the path of interpreting §1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose - by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. See the remarks of Representatives Willard and Shellabarger, quoted supra, at 100, 29 L.Ed.2d, at 347. The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all."

Stewart grounded the 1971 decision upon three factors: (1) the plain language of 42 USC

Sect. 1985; (2) the statutory scheme of the 1871 Civil Rights Act, taken as a whole (42 USC Sect. 1983 and 1985) and (3) the legislative history of the Civil Rights legislation in 1871. In examining the plain language of Section 1985, Stewart noted the failure to include the same phrase "under color of law," used in Section 1983, and remarked at page 345:

> "Indeed, the failure to mention any such requisite can be viewed as an important indication of Congressional intent to speak in Section 1985(3) of all deprivation of 'equal protection of the laws' and 'equal privileges and immunities under the law,' whatever the source."

Analysing the statute further, he examined the Civil Rights legislation as a whole (Sections 1983 and 1985) and noted at page 346:

> "An element of the cause of action established by the first section, now 42 USC Sect. 1983, is that the deprivation complained of must have been inflicted under color of state law. To read any such requirement into section 1985(3) would thus deprive that section of all independent effect. . . .Given the existence of these three provisions, it is almost impossible to believe that Congress intended, in the dissimilar language of that portion of section 1985(3) now before us, simply to duplicate the coverage of one or more of them. . ." (Our emphasis.)

Since Sections 1985 and 1983 were enacted together as part of an integrated statutory

scheme and must be read together, and if it was never the intent of Section 1985 to reach other than "racial, or perhaps otherwise class based, invidious discriminatory animus", then certainly the reach of Section 1983 is no broader and certainly does not justify making the federal district courts a trial court forum to litigate public nuisance lawsuits, lacking in racial or class based invidious discriminatory animus. Particularly must this be so, where, as in the case of suppression of public nuisances, an important governmental interest is being furthered and local government is attempting to discharge its historic responsibility to the community to maintain a healthy moral climate. To construe the Civil Rights Act as functioning differently in such a case flies in the face of a contrary policy enunciated by the United States Supreme Court in relation to the suppression of public nuisances, at the time of the enactment of the Civil Rights Act. See James Phalen v. Commonwealth of Virginia, supra.

In light of Phalen v. Commonwealth of Virginia, supra, the broad language of Justice Brennan's opinion in Steffel v. Thompson, 415 U.S. 452, 39 L.Ed.2d 505, 94 S.Ct. 1209, at page 517 and 518 (March 19, 1971) with it emphasis on "the great impulse of national feeling born of

the Civil War", cannot logically be read to authorize the type of federal interference indulged in here under the guise of an 1871 "Civil Rights Action". To so hold would abnegate powers flowing from the Bill of Rights and Tenth Amendment which reserve to the States "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States. . ."

This Court's ruling in Mitchum v. Foster, 407 U.S. 225, 32 L.Ed.2d 705, 92 S.Ct. 215 (June 19, 1972) did not hold that 42 U.S.C. Section 1983 embraces a civil rights action of the sort pleaded herein, i.e., against state officials for state action taken to abate as a public nuisance a business dealing in obscenity as a regular course of conduct. All that case decided was that the three-judge court below erred in its prefactory ruling in the abstract that the injunctive relief sought was unavailable since 42 U.S.C. Section 1983, under which that lawsuit was brought, was not an Act of Congress within the "expressly authorized" exception of the anti-injunction statute which would authorize a federal court to grant injunctive relief and stay proceedings in a state court. Nor did this Court consider in Mitchum, supra, whether the plaintiff in that action, did, in fact, state a cause of action under 42 U.S.C. Section 1983. See Farrell v. Joel, Jr., 437 F.2d 160 (2nd Circuit,

January 20, 1971), a civil rights case based upon 42 U.S.C. Section 1983 to review school administration practice, where Circuit Judge Feinberg, speaking for the 2nd Circuit (Lumbard, Feinberg, Clarie) noted at page 162:

> "Appellant assumes that his complaint states a viable action under the Civil Rights Act. 42 U.S.C. Section 1983, and its jurisdictional counterpart 28 U.S.C. Section 1343(3). It is a measure of the change in the law over the past decade that the defendants and the district court did not question this assumption. . . ." (Our emphasis.)

Whatever may be the limits of "civil rights" jurisdiction, there is some point of "end" in the path where logic "seems" to point. See U.S. v. 12-200 foot reels, 413 U.S. 123 at 127, 37 L.Ed.2d 500 at 505, 93 S.Ct. 2665 (June 21, 1973) this Court must weigh in the balance its past difficulties with federal interference in the obscenity and other areas of traditional state court activity during the past terms of court, which culminated in its rulings restricting federal interference in Atlantic Coast Line Railroad Co., v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 288, 26 L.Ed2d 234, 90 S.Ct. 1739 (June 8, 1970), during the 1969 October Term and in Younger v. Harris, supra, and other cases during the 1970 October Term. It would be a tragedy were this Court to forget

that such federal interference has caused an incredible logjam to this court's docket in the past, and to overlook the fact that the federal interference in this case has effectively deprived the Texas Equity Courts of their right to control moral public nuisances for 6 years.

III

ARTICLE 4667(a) (3) OF THE CIVIL STATUTES OF TEXAS IS A VALID APPLICATION OF THE TIME-HONORED "NUISANCE" PRINCIPLE. THE BROAD RANGE OF REMEDIES WHICH MAY ISSUE OUT OF A TEXAS COURT OF EQUITY UNDER THAT PRINCIPLE ARE CONSTITUTIONAL AS PENALTIES FOR PAST UNLAWFUL CONDUCT IN THE CREATION AND MAINTENANCE OF A PLACE OF BUSINESS WHICH IS A PER SE MORAL PUBLIC NUISANCE, AND ARE NOT UNCONSTITUTIONAL AS A PRIOR RESTRAINT BECAUSE OF THEIR "CHILLING EFFECT" ON FREE SPEECH GENERALLY.

A. An Overview Of The "Nuisance" Legal Concept.

The legal term "nuisance" embraces three different areas of the law and as many different kinds of remedies: (1) the criminal area with its remedy of the criminal penalties of fine, imprisonment, and forfeiture, (2) the civil "tort" area with its civil "damages" remedy which awards compensatory damages for loss or harm suffered in person or property from the unlawful act, and both nominal and punitive damages where "malice" is also established, and (3) the equitable area with a host of equitable remedies against the "res" and persons in control thereof, such as injunction, constructive trust, destruction of the offending property and forfeiture. See, for example, 41 Tex.Jur.2d "Nuisances" §59 in general; Remedies available at

page 624; §65 Suits in Equity at page 631; §77 Action for Damages at page 654; §84 Criminal Prosecution at page 665.

In addition, a "nuisance" may be either (1) a private nuisance, (2) a public nuisance, or (3) both a private and a public nuisance, as in the case of a public nuisance which interferes with the enjoyment of land.

1. The Historical Development of The Cause of Action Abating A Private Nuisance And The Cause of Action Abating A Public Nuisance.

Historically, the law of nuisances began with the former type of redress - the private nuisance arising out of an interest in real property. Prosser on Torts (3d Edition) at page 593. The assize of nuisance, which was a criminal writ affording incidental civil relief, was designed to cover invasions of the plaintiff's land due to conduct wholly on the land of the defendant. Its purpose was to reform the condition of the land. This was replaced by the action on the case for nuisance, which became the sole common law action. The common law remedy was limited strictly to interference with the use or enjoyment of land and was the parent of the law of private nuisance as advanced today.

Paralleling this civil remedy protecting the rights on land, there developed an entirely

separate principle, based upon the rights of the general public in land (such as encroachments on public easements). This principle developed as a criminal redress in a suit brought by the Crown - "This came to include obstructed highways, lotteries, unlicensed stage plays, common scolds, and a host of other rag ends of the law." Newark, The Boundaries of Nuisance, 1949, 65 L.Q. Rev. 480, 482. By degrees, the public offense was greatly enlarged until it came to include "any act not warranted by law, or omission to discharge a legal duty, which inconveniences the public in the exercise of rights common to all Her Majesty's subjects." Stephen, General View of the Criminal Law of England, 1890 at 105. See, for example, former Texas Penal Law Article 695, which appeared in Title 12 Public Health, chapter one, Acts Injurious to Health, reading:

"Article 695. Nuisances.

> Whoever shall carry on any trade, business or occupation injurious to the health of those who reside in the vicinity, or suffer any substance which has that effect to remain on premises in his possession, shall be fined not less than ten nor more than one hundred dollars. Each day is a separate offense." (Our emphasis.)

This "public" nuisance remained exclusively a criminal one until the 16th Century, when it was recognized that a private individual who had

suffered special damage might have a civil action in tort for the invasion of the public right. Prosser on Torts (3d Edition) at page 593. 41 Texas Jur.2d §7 Public and Private Nuisances at pages 580-582.

2. A Comparison: Cause Of Action Abating A Private Nuisance Versus Cause Of Action Abating A Public Nuisance On A Showing Of "Special Injury".

There is a distinct difference between the concept of a civil action to abate a "private" nuisance arising out of one's ownership in real property, and the concept of a civil action to abate a "public" nuisance brought by a private person who suffers "special injury" from the public nuisance. In the former situation, the right is dependent upon one's private ownership in land, and arises out of damage to his interest in and rights arising out of the use of that land, whereas the latter originates in a public right, is not dependent upon ownership in land and need not (but in special cases may) consist of pecuniary damage or damage to real property, and may only consist of interference with the comfortable enjoyment of life and property. In the case of a civil action brought by a private person to abate a "public" nuisance, the pleading requirement that "special injury" be alleged, introduces the additional problem of establishing "standing

to sue" in such cases. See 41 Tex.Jur.2d §70 Persons Entitled to Relief at pages 642-644.

3. Under The Common Law And The Statutory Law On "Nuisances" For The State Of Texas, The Term "Public Nuisance" Embraces Both The "Moral" Public Nuisance, Such As The Business And Conduct Of Trading In Obscenity Which Is Offensive To The Moral Sense, And The "Physical" Public Nuisance Which Is Offensive To One Of The 5 Physical Senses.

From the earliest days of Anglo-Saxon law, a "moral" nuisance has been abatable as a public nuisance. At common law, trading in obscenity was a "moral" public nuisance. See H.G. Wood, The Law of Nuisances, section 57, at page 77 and section 65 at page 85:

> "57. Indecent exposure of one's person in public place, a public nuisance - As has previously been stated, anything that is offensive to the morals of society, or that is indecent, is a public nuisance. Therefore, any indecent exposure of one's person in a public place, in the presence of several persons, is a public nuisance, and indictable and punishable as such at common law. It is a nuisance because it shocks the moral sensibilities, outrages decency, and is offensive to those feelings of chastity that people of ordinary respectability entertain. . . ."
>
> "65. Selling obscene picture books etc. Common nuisance - So, too, all obscene pictures, prints, books or devices are common nuisances, and any person having

them in his or her possession for the purpose of exhibition or sale may be indicted therefor at common law, because they are clearly in derogation of public morals and common decency." 10/

This common law rule as to certain moral public nuisances has been codified in Vernon's Civil Statutes of Texas, articles 4664-4668.

4. A "Moral" Nuisance Is A "Per Se" Public Nuisance. The Power To Abate The Same Is Inherent In Government, Which Is Under An Obligation To Remove The "Moral" Nuisance.

This common law power to abate a public nuisance is regarded as one of the most basic powers of local government - the power possessed by municipal government in aid of its duty to protect the local community against that type of public conduct which is regarded as being malum in se. In addressing himself to the public morals issue and the pre-eminent power of local government to control the same, Wood describes the danger as being in the nature of a "nuisance per se." See "The Law of Nuisances" by H.G. Wood, Sections 23 and 24, at pages 45-46:

"Section 23. Acts affecting public morals, public nuisances per se, when. - There are classes or kinds of businesses which are nuisances per se, and the very fact that

10/ Commonwealth v. Holmes, 17 Mass. 336; Commonwealth v. Sharpless, 2 S and R (Penn) 91; 7 Am. Dec. 632.

they are carried on in a public place is prima facie sufficient to establish the offense. But in such cases, if the respondent questions that the use of his property in the manner charged in the indictment produces the effects set forth therein, and introduces evidence to sustain his position, it then becomes necessary to prove that the effects are such as are charged. But there are a class of nuisances arising from the use of real property and from one's personal conduct that are nuisances per se, irrespective of their results and location, and the existence of which only need to be proved in any locality, whether near to or far removed from cities, towns, or human habitations, to bring them within the purview of public nuisances. This latter class are those intangible injuries which affect the morality of mankind, and are in derogation of public morals and public decency."

"Section 24. Wrongs malum in se. - This class of nuisances are of that aggravated class of wrongs, that being malum in se, the courts need no proof of their bad results and require none. The experience of all mankind condemns any occupation that tampers with the public morals, tends to idleness and the promotion of evil manners, and anything that produces that result finds no encouragement from the law, but is universally regarded and condemned by it as a public nuisance." (Our emphasis.)

The power to abate a per se public nuisance is inherent in government itself and is so basic that its grant of authority is said to be "implied", and to flow from the Common Law and basic civil rights inherent in individuals, rather than from

"express" provisions in the City's Charter or the General Laws of the State. See "The Law of Nuisances," Wood, Section 743, at page 972:

> "Section 743. No control over nuisances without special power. - Therefore, a municipal corporation has no control over nuisances existing within its corporate limits except such as is conferred upon it by its charter or by general law. There can be no question, however, but that where a nuisance exists within its corporate limits that is clearly a nuisance at common law or by statute, which is detrimental to the health of the inhabitants, it may be abated by the authorities, but it must be a nuisance at common law and one which any person injured thereby might lawfully abate of his own motion, or in the absence of express or implied authority given, the removal or abatement of the nuisance would be unlawful. Where the thing abated is clearly a nuisance, and one which affects the health of the city, the abatement may be made by the authorities or by any person injured thereby. The common law in such a case comes in aid of the authorities, and they are justified in the act, not because they are officials of the city, but because they are citizens injured by the thing abated." (Our emphasis.)

An explanation of Wood's comment that the power to abate such nuisances within the corporate limits of a city is inherent in the people within the city appears in "The Law of Municipal Corporations", by McQuillin, Vol. 2, at §4.82. "Inherent right of local self-government" at p. 145:

> "Distinction should be made between the right of local self-government as inherent in the people, and the right as inherent in a municipal corporation; while as to the people, the right has quite commonly been assumed to exist, but as to the municipal corporation the right must be derived, either from the people through the constitution or from the legislature."

The intention to preserve and perpetuate the ancient right of people to local self-government is apparent throughout the scope of most of the state constitutions. As pointed out by McQuillin, supra, at page 150, footnote 89, where matters of local or municipal concerns are involved, the right of local self-government is basic.

One way of explaining this governmental right recognizes that when a special power, such as nuisance abatement, is conferred upon a city for municipal purposes, and where the moral public nuisance is within the territorial limits of a city, it becomes a "municipal affair" for that city rather than a "state" affair. — See "The Law of Municipal Corporations", supra, at page 163:

> "In short, legislative control over municipalities often depends on whether the subject matter involved relates to something of purely local concern, herein generally referred to as a municipal affair or to something in which the public at large outside the municipality are concerned, herein generally referred to as a state affair." McQuillin, supra, at page 141.

See also Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 436, 93 S.Ct. 2607 and Hamling v. U.S., 418 U.S. 87, 41 L.Ed.2d 590, 614, 94 S.Ct. 2887 (June 24, 1974), which adopted "local community standards" as the constitutional test for the factual determination of obscenity.

Joyce, in his treatise "Law of Nuisance", Section 345, points out that, under the common law power, the municipal corporation not only has the right, but it also has the obligation to remove the public nuisance; at page 498:

> "The rule is declared to be settled, without dissent, that, without a special grant of authority, public corporations may, as a common law power, cause the abatement of nuisances, and if the nuisance cannot otherwise be abated, may destroy the thing which constitutes it. And it is said that a municipal corporation has not only the right, but is also under the obligation, to remove nuisances which may endanger the health of its citizens; that it has the power to decide in what manner this shall be done; and that its decision is conclusive unless it transcends the power conferred by the charter or violates the constitutuion."

In the case of a "moral" public nuisance the obligation to remove the nuisance is limited only by the requirement that such abatement should be accomplished through the court process. See "The Law of Nuisances" by H.G. Wood, Section 32, "What nuisances are only abatable by the courts" at page 53; see also "Law of Nuisances" by Joseph

A. Joyce at page 507.

More than a century ago, this Court pointed out in James Phalen v. The Commonwealth of Virginia, 12 L.Ed. 1030, 1033 (1850):

> "The suppression of nuisances injurious to public health or morality is among the most important duties of government. . . ."
>
> "It is a principle of the common law, that the king cannot sanction a nuisance. . . ."

Where a nuisance affects the morals of the community, this Court has stated that the jurisdiction of the Equity Court to deal with the same is "salutory." Mugler v. Kansas, 123 U.S. 205 (Dec. 5, 1887). In Mugler, supra, this Court specifically held that Equity Courts do have the power to enter summary interlocutory "abatement" orders in proper cases. There, a petition had been filed in the Kansas State Court under the thirteenth section of a statute asking (1) that a group of buildings, constituting the brewery of the defendants, be adjudged a common nuisance, and the sheriff directed to shut up and abate the same, and (2) that the defendants be enjoined from using the premises. The petition was thereafter removed to the federal court and dismissed on the grounds that the "closure" remedy violated due process. On appeal, the U.S. Supreme Court reversed, holding at page 214:

"Equally untenable is the proposition that proceedings in equity for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law. 'In regard to public nuisances,' Mr. Justice Story says, 'the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. . . . In case of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction.' 2 Story, Eq. §§921, 922. The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law. <u>They can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future;</u> whereas, courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. <u>This is a salutory jurisdiction, especially where a nuisance affects the health, morals, or safety of the community.</u> Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury." (Cites omitted.)

"As to the objection that the statute makes no provision for a jury trial in cases like this one, it is sufficient to say that such a mode of trial is not required in suits

in equity brought to abate a public nuisance. The statutory direction that an injunction issue at the commencement of the action is not to be construed as dispensing with such preliminary proof as is necessary to authorize an injunction pending the suit. The court is not to issue an injunction simply because one is asked, or because the charge is made that a common nuisance is maintained in violation of law. The statute leaves the court at liberty to give effect to the principle that an injunction will not be granted to restrain a nuisance, except upon clear and satisfactory evidence that one exists. Here the fact to be ascertained was, not whether a place, kept and maintained for purposes forbidden by the statute, was, per se, a nuisance -- that fact being conclusively determined by the statute itself -- but whether the place in question was so kept and maintained. If the proof upon that point is not full or sufficient, the court can refuse an injunction, or postpone action until the State first obtains the verdict of a jury in her favor. . . ." (Our emphasis.)

B. The Historical Background In The Application Of The "Nuisance" Concept And Its Remedies To The <u>Special</u> "Moral" Public Nuisance Abatement Statute Involving A House Of Prostitution (1907 Red Light Abatement Statute) <u>And Its Modern Extension</u> To A Business Dealing In Obscenity.

Consider the following hypothetical situation: Suppose that, over a short and continuous period of time, Jurisdiction "A" filed a succession of nine*/ different criminal complaints against an activity, alleging that on each of those nine

*/ <u>Richards v. Texas</u> involved 9 films. See Statement of the Case at page 10.

occasions the operators of such business had aided and abetted in acts of prostitution which occurred on the premises and that, after each criminal charge a criminal trial had taken place and the defendant had been found guilty as charged. Can there be any doubt that, under general principles of law, with or without benefit of statute, a Prosecuting attorney in that jurisdiction could successfully state a civil cause of action, alleging that the repeated and continuing illegal conduct of business at that address constituted a moral public nuisance which should be abated? Certainly, in such case, an equity court could make a finding that such repeated illegal conduct at that address constituted a moral public nuisance, and upon a further finding that such condition was continuing and presently existed, could authorize that the same be closed as a public nuisance. Having found the public nuisance to be presently in being, an equity court would be authorized to lay down the conditions upon which the activity might remain in operation, one of which could be that the errant party show to the satisfaction of the court that the public nuisance no longer existed? In such a case, where the proof shows that by reason of sufficient happenings, the premises have taken on the character of the acts therein committed, the premises can be

abated as a moral nuisance. See Pitman et al. v. Texas, 234 S.W.2d 436 (Oct. 26, 1956) interpreting Article 4667, as basically an action in rem to abate the place itself; at page 438:

> "The emergency clause incorporated in S.B.No. 176 of the 29th Legislature which discloses the purpose of the enactment of Article 4667, Sec. 1, reads: 'The fact that there is no adequate remedy to suppress gaming houses in this state creates an emergency and an imperative necessity that constitutional rule requiring bills to be read on three several days be suspended, and that this act take effect and be in force from and after its passage, and it is so enacted.'
>
> "The foregoing declaration of purpose or intent with the employment in the article of the language '* * * use of any premises' classifies such an action, as here, as basically an action in rem, that is, to abate the use of a place, premises or building for gaming.
>
> "This article contemplates an action against a building, place or premises, in a sense, a condemnation of such where it is being used for gaming. The intent may be compared to an action to padlock certain premises, which universally are, and should be, pointed or singled out by some descriptive data to support an action for contempt of court."

Add an additional factor for a new hypothetical. Suppose that in the above Jurisdiction "A", the legal process for getting criminal matters to trial and for getting such criminal trials finalized has been rendered inoperative for any

of a number of reasons. May Jurisdiction "A" circumvent the criminal trial pitfall and select, in the first instance, as the primary law enforcement tool against a "moral" nuisance, the civil action to abate the premises as a moral public nuisance, alleging and proving in that single trial a course of continuing illegal conduct by establishing as evidence the acts which comprise the alleged criminal violations and illegal course of conduct, asking that Equity step in and render assistance? Justice Keith, speaking for the Court of Civil Appeals in Richards v. Texas, 497 S.W.2d 770 (July 2, 1973) answered that question in the affirmative at page 780:

> "The trial court was confronted with an unchallenged record showing that the defendants, over a long period of time, had sold and exhibited obscene and pornographic films in violation of a valid criminal statute. Obviously the cumbersome process of seizing and condemning each particular film when exhibited would take all of the time of one district judge, a justice of the peace standing by to issue search warrants and hold preliminary hearings, as well as a corps of police officers and assistant district attorneys.
>
> Chief Justice Burger said in Slaton, supra, (U.S. at , 93 S.Ct. at 2633): 'It should be clear from the outset that we do not undertake to tell the States what they must do, but rather to define the area in which they may chart their own course in dealing with obscene material.' Historically,

> in other areas of the law than pornography, equity has been able to fashion the remedies necessary to the public welfare. Thus, if we liken defendants' conduct to that of a public nuisance, there would be no obstacle to equity enjoining its continuance. See the long line of cases cited in Lowe, 6 Texas Practice, Remedies §33, p. 61 (2d Ed. 1973). We are unwilling to hold that there is no method which can be found to stop conduct of parties such as shown by our record.
>
> "The decree is specific, definite, and clear. The defendants do not even need a dictionary to learn what is prohibited since the parenthetical material following the Latin-derived words makes the order clear. The decree, being based upon a valid statute, should be upheld, if possible. We modify, and affirm, this section of the decree, doing so under what we consider to be the explicit holding of Miller, supra. . . ."

The Texas Red Light Abatement Act of 1907, (Acts 1907, p. 246) was created in just such an atmosphere. At that time in history, "lewdness" of a different type (but involving the same procedural problems as in the case of the obscenity "moral" nuisance) was plaguing society. Although the 1907 common law bawdy or disorderly house "moral" nuisance could have been proceeded against under the common law law enforcement authority regarding general public nuisances, there was little likelihood that the results which would be reached under that general statute would be

consistent, or that the ends which were sought after could be uniformly achieved. The need for a special Red Light Abatement Statute and remedy along the lines which were approved by the U.S. Supreme Court in Mugler v. Kansas, supra, and which would produce consistent and uniform results, was uniformly felt throughout the nation. See 20 Columbia Law Review at 604, which traces in part the history of such special legislation:

> "'Red Light' Injunction and Abatement Acts - The strong arm of equity has lately found increasing employment through the enactment in thirty-eight states of 'Red Light' laws for the abatement of disorderly houses. Modelled upon the liquor laws which originated in Iowa, these laws owe their enactment to the inadequacy of criminal prosecutions; and accordingly permit any citizen of the county wherein the nuisance exists to bring his civil action to enjoin and abate it. The effectiveness of the legislation lies in stringent provisions for abatement and in penalties for contempt.
>
> "This is clearly police legislation, designed to protect the public health and morals rather than to provide a remedy for injury to private property. For instance, the injunction is made binding upon the defendants throughout the jurisdiction of the court and frequently throughout the entire state. Not only are the costs of the action made a lien upon the premises; but in many states a 'tax' or fine is levied when the final injunction is issued. . . ."

1. The Extension Of The General Public Nuisance Statutes And Special Red Light Abatement Statutes To Include Businesses Dealing In Obscenity.

When the business of dealing solely in obscenity became so wide-spread in the early 1970's, with the introduction of the porno theater and porno book store and the same inadequacy of criminal prosecutions being felt in that area, one legislative reaction was to look to the solution which was found in the Red Light Abatement Statutes, viewing the common law "obscenity" moral nuisance as being of the same class or order as the common law "bawdy house" moral nuisance. Viewing the problem in the light of its historical background, it seems clear that those parallels are properly drawn and that the same type of legislation, from a constitutional standpoint, can be applied to the subject matter. In Kingsley Book, Inc. v. Brown, 354 U.S. 436, Justice Frankfurter, writing for the majority court, supplies the following answer at page 441:

> "We need not linger over the suggestion that something can be drawn out of the due process clause of the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this court thus to limit the state in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or

by a qui tam action, or by an injunction or by some or all of these remedies in combination is a matter within the legislature's range of choice (citation). If New York chooses to subject persons who disseminate obscene 'literature' to criminal prosecution and also to treat with such books as deodands of old, or both, with due regard of course, to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies. . . ." (Our emphasis.)

The terms "qui tam action" and "deodand", referred to by Justice Frankfurter, are defined in Black's Law Dictionary, Revised, 4th Edition, as:

"QUI TAM. Lat. 'Who as well . . ." An action brought by an informer under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution, is called a 'qui tam action'; because the plaintiff states that he sues as well for the state as for himself. See In Re Barker, 56 Vt. 14; Grover v. Morris, 73 N.Y. 478."

"DEODAND (L.Lat. DEO dandum, a thing to be given to God) in English law. Any personal chattel which was the immediate occasion of the death of any reasonable creature, and which was forfeited to the Crown to be applied to pious uses, and distributed in alms by the High Almoner. 1 Hale, P.C. 419; Fleta, Lib. 1, C25; 1 Bl. Comm. 300; 2 Steth. Comm. 365. See Parker-Harris Co. v. Tate, 135 Tenn. 509, 188 S.W. 54, LRA 1916F, 935."

Today, forty-one of the 50 states have a statute which employs the "Red Light Abatement" pattern of enforcement against "bawdy houses". The historical development of this type of statute has been in three directions: (1) a few states, like Missouri, use statutory language which is clearly limited to houses of prostitution and which could not be interpreted to include any form of obscenity (M.R.S. section 563.130); (2) ten states have adopted amendments and statutory language which specifically includes places dealing with obscenity in the operation of the statute, (these states are: Delaware Article 10, Chapter 72 of the Delaware Code added in 1974 to include places dealing in obscene motion pictures and books; Idaho, Title 52, Chapter 1 and 4, as added in 1976; Indiana, Section 9-2711 of the Indiana Code, added in 1973 to include places dealing with lewd, indecent, lascivious or obscene films; Kansas, Article 39 K.S.A. Section 22-3901, added in 1970 makes "promoting obscenity" a common nuisance and subject to the Red Light type abatement procedures; Louisiana, amended Title 13 L.R.S. of 1950, Section 4711 to include maintainance of obscenity as defined by the penal laws in the definition of nuisance; Nebraska, enacted Legislative Bill 815 in 1974 which provides in Section 15 that a

place dealing in obscene films is a nuisance; Ohio, the definition of nuisance in O.R.S. 3767.01 et seq., enacted in 1961, has served as a model for other states expansion of their Red Light Abatement statutes; Tennessee, Section 23-301 of the Tennessee Code Annotated, amended in 1973 to include a place dealing in obscene films as being within the definition of a place of lewdness; Texas, articles 4664 and 4667 of the Texas Penal Code, effective January 1, 1974 specifically provide for the enjoining of the use of a premises for purposes of "commercial obscenity"; (3) other states, like Alabama, California, and Michigan have used statutory language like "lewdness, assignation or prostitution" in which, by judicial decision, the term "lewdness" had been given a broad meaning, and as to which a further expansion of definition was sought which would include the "obscenity" moral nuisance.

Other states have adopted special legislation on the subject. Prior to 1976, Idaho was the only state in the Union which had separately identified the "moral" public nuisance as such. See Idaho Statutes, Section 52-103, as added to the Idaho Codes in 1915. In 1976, the Idaho State Legislature amended its provisions on the abatement of moral public nuisances to incorporate the provisions of the Ohio Red Light Abatement Statute

which had recently been considered by the United States Supreme Court in Art Theatre Guild, Inc. et al. v. Ohio ex rel. Ewing, and to deal specifically with the subject of obscene matter. Similarly, Washington, North Carolina and Arizona have adopted special legislation, based upon the approach used by the Idaho Legislature. Title 52, Chapters 1 and 4, Idaho Code, Title 7, Chapter 7.48, Revised Code of Washington; Chapter 19, North Carolina General Statutes; Chapter 7, Article 1.1, Arizona Revised Code. A copy of those statutes is attached to this brief at Appendix A.

Because questions relative to statutory history have supplied considerable grist for the mill in the interpretation of public nuisance abatement legislation, see the tortuous language of Justice Tobriner's dissent in People ex rel. Busch et al. v. Projection Room Theater et al., 17 Cal.3d 42, 64, 130 Cal.Rptr. 328, 341 et seq. (June 1, 1976), the history of the development of those cases has considerable relevance in this appeal. The nature and extent of the struggle by state law enforcement to reassert and reaffirm the common law public nuisance abatement approach to the "moral" nuisance of obscenity (porno theaters, porno book stores and porno films) can be seen from the number of obscenity cases involving the public nuisance approach which

have appeared upon the docket of the U.S. Supreme Court in recent years.

2. Public Nuisance Cases Which Have Appeared Upon The U.S. Supreme Court Docket, 1972-1976 Terms.

1972 October Term

(1) Grove Press, Inc. v. Flask, (Film "I Am Curious (Yellow)" held to be a public nuisance in Youngstown, Ohio under Ohio Public Nuisance Statute - a Federal Civil Rights Action), 326 F.Supp. 574, (Mar. 10, 1970), vacated and remanded in Grove Press, Inc. v. Flask, (70-1) 413 U.S. 902, 37 L.Ed.2d 1013, 93 S.Ct. 3026 (June 25, 1973).

(2) A Motion Picture Film Entitled "Vixen" v. Ohio ex rel. Keating, (Film "Vixen" held by Ohio Supreme Court to be a public nuisance in Cincinnati, Ohio under Ohio Public Nuisance Statutes) 27 Ohio St.2d 278, 56 Ohio Ops.2d 165, 272 N.E.2d 139, vacated and remanded in A Motion Picture Film Entitled "Vixen" v. Ohio ex rel. Keating, (71-599), 413 U.S. 905, 37 L.Ed.2d 1016, 93 S.Ct. 3033 (June 25, 1973).

(3) Gulf States Theatres of Louisiana Inc. v. Louisiana ("The Stewardesses" held by Louisiana Supreme Court to be a public nuisance in Shreveport, Louisiana under Louisiana Public Nuisance Statute), 264 La. 44, 270 So.2d 547 (Dec. 18, 1972) vacated and remanded in Gulf States Theatres of Louisiana

Inc. v. Louisiana (72-1221), 413 U.S. 913, 37 L.Ed.2d 1036, 93 S.Ct. 3063 (June 25, 1973). 11/

(4) Lawrence S. Huffman, as Prosecuting Attorney for Allen County, Ohio, et al. v. U.S. District Court for the Northern District of Ohio, Western Division, et al. (Motion picture theater continuous course of conduct -- 16 films in a two-month period. Held, by trial court, to be a public nuisance in Lima, Ohio under Ohio public nuisance statute and the theater closed on a final injunction. Closure of the theater enjoined by a three-judge federal district court

11/Thus far, this Court has refused to accept this issue for its full consideration. The uncertainty which is developing as a result of this Court's inaction is pointed up by the final result reached in Gulf States Theatres of Louisiana, Inc. v. Louisiana, supra. In its original opinion in 270 So.2d 547, the Louisiana Supreme Court by a 4-3 vote had upheld the Louisiana Red Light Abatement Act, its application to the film "The Stewardesses", and the "padlock" penalty. When the U.S. Supreme Court remanded all of the obscenity cases, following its ruling on June 21, 1973 in Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, a change of membership had taken place on the Louisiana Supreme Court and, upon remand the new 4-3 majority of that court which was balanced in a different direction as to whether obscenity should be suppressed, declared both the Louisiana obscenity laws and the Red Light Abatement Act's obscenity application to be invalid. A major authority in support of the public nuisance concept suddenly became a major authority against its application. See 287 So.2d 496, supra, (Dec. 3, 1973).

and padlock provision held to be unconstitutional), (No. 72-1613), Application for stay or writ of injunction denied in 413 U.S. 918, 37 L.Ed.2d 1039, 93 S.Ct. 3068 (June 25, 1973).

1973 October Term

(1) Speight T/A Harem Book Store v. Slaton (Porno Book Store. 3-judge federal district court (2-1) refused to interfere with a state civil action to abate a porno book store as a public nuisance under Georgia statute which made a violation of a criminal statute a public nuisance), 356 F.Supp. 1101 (Feb. 22, 1973). Probable jurisdiction noted in Speight et al. T/A Harem Book Store v. Slaton etc., et al., (No. 72-1557) 414 U.S. 815, 38 L. Ed.2d 48, 94 S.Ct. 129 (Oct. 9, 1973), vacated and remanded in Speight T/A Harem Book Store et al. v. Slaton etc., et al., (No. 72-1557) 415 U.S. 333, 39 L.Ed.2d 367, 94 S.Ct. 1098 (Feb. 27, 1974), following decision by the Georgia Supreme Court in Sanders v. Georgia, 203 S.E.2d 153 (Jan. 28, 1974) that the sale of 3 obscene magazines did not make the premises a public nuisance.

(2) Lawrence S. Huffman as Prosecuting Attorney for Allen County, Ohio et al. v. Pursue Ltd. (Motion picture theater continuous course of conduct — 16 films in a two-month period. Held to be a public nuisance in Lima, Ohio under

Ohio Public Nuisance Statute and the theater closed on a final injunction. Closure of theater enjoined by a three-judge federal district court and padlock provision held to be unconstitutional) (No. 73-296). Probable jurisdiction noted and set for oral argument in tandem with No. 73-1119 in 415 U.S. 974, 39 L.Ed.2d 870, 94 S.Ct. 1559 (Mar. 18, 1974).

(3) MIM, Inc. et al. v. William J. Baxley etc., et al., (Motion picture theater course of conduct. 3-judge federal district court refused to entertain a civil rights complaint to enjoin enforcement of a state court temporary injunction which closed the theater under Alabama Red Light Abatement Law) (No. 73-1119). Probable jurisdiction noted and set for oral argument in tandem with No. 73-296 in 415 U.S. 975, 39 L.Ed.2d 870, 94 S.Ct. 1559 (Mar. 18, 1974).

(4) Louisiana et al. v. Gulf States Theatres of Louisiana, Inc. et al. (Film "The Stewardesses". On remand of No. 72-1221, new 4-3 majority of Louisiana Supreme Court held the obscenity definition and the criminal ordinance unconstitutional and reversed prior judgment under nuisance abatement statute) 287 So.2d 496 (Dec. 3, 1973), petition for writ of certiorari denied in Louisiana et al. v. Gulf States Theatres of Louisiana, Inc. et al., (No. 73-1458) 417 U.S. 911, 41 L.Ed.2d 215,

94 S.Ct. 2610 (May 28, 1974).

1974 October Term

(1) Lawrence S. Huffman as Prosecuting Attorney for Allen County, Ohio et al. v. Pursue Ltd. (Motion picture theater continuous course of conduct — 16 films in a two-month period) (No. 73-296), vacated and remanded in Lawrence S. Huffman, as Prosecuting Attorney for Allen County, Ohio et al. v. Pursue Ltd., 420 U.S. 592, 43 L.Ed. 2d 482, 95 S.Ct. 1200 (Mar. 18, 1975).

(2) MIM, Inc. et al. v. Baxley, etc. et al. (Motion Picture Theater course of conduct (No. 73-1119)). This Court avoided the issue, holding that it was without jurisdiction to consider the direct appeal, since the 3-judge court did not reach the merits of the attack on the Alabama Red Light Abatement Statute. Vacated and remanded in MIM, Inc., et al., v. Baxley, etc., et al., 420 U.S. 799, 43 L.Ed.2d 636, 95 S.Ct. 1278 (Mar. 25, 1975).

(3) Art Theater Guild, Inc., et al. v. Ohio ex rel. Ewing (Film "Without A Stitch" held by Ohio Supreme Court to be a public nuisance (Toledo) under the Ohio Red Light Abatement Statute. Closure provision applied) 37 Ohio St.2d 95, 307 N.E.2d 911 (Feb. 27, 1974), appeal dismissed for want of a substantial federal question in Art Theater Guild Inc., et al., v. Ohio ex

rel. Ewing (No. 73-1973) 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (Apr. 21, 1975).

(4) Marks et al. v. Leis (Book Store. 3-judge federal district court upheld constitutionality of Ohio Red Light Abatement Statute as being applied to a porno book store) (unreported), vacated and remanded in Marks et al. v. Leis (No. 74-793) 421 U.S. 940, 44 L.Ed.2d 96, 95 S.Ct. 1669 (Apr. 28, 1975).

(5) Art Theater Guild, Inc. et al., v. Ohio ex rel. Schoen (Film "The Stewardesses" and "History of a Blue Movie" held by Ohio Supreme Court to be a public nuisance in Toledo, Ohio under the Ohio Red Light Abatement Statute (public nuisance statute)) (unreported), appeal dismissed for failure to file a timely notice of appeal in Art Theater Guild, Inc. et al. v. Ohio ex rel. Schoen (No. 74-955) 421 U.S. 957, 44 L.Ed. 2d 445, 95 S.Ct. 1944 (May 12, 1975).

(6) Art Theater Guild, Inc. et al. v. Ohio ex rel. Robert J. Anderson (Film "Deep Throat" held by Ohio Supreme Court to be a public nuisance in Toledo under the Ohio Red Light Abatement Statute) (unreported) appeal dismissed for failure to file a timely notice of appeal in Art Theater Guild, Inc., et al. v. Ohio ex rel. Robert J. Anderson (No. 74-956) 421 U.S. 957, 44 L.Ed.2d 445, 95 S.Ct. 1944 (May 12, 1975).

1975 October Term

(1) Nihiser v. Sendak, 405 F.Supp. 482 (June 9, 1974) (Film "Deep Throat". Civil Rights action against Attorney General to enjoin use of public nuisance statute.) (N.D. Ind. Nov. 14, 1974) (No. 74-1165) vacated and remanded in Sendak, etc., v. Nihiser, dba Movieland Drive-In Theater, 423 U.S. 976, 46 L.Ed.2d, 96 S.Ct. 378 (Nov. 17, 1975).

(2) California ex rel. Camil v. Buena Vista Cinema et al., No. C-107347 (unreported) (Civil action to abate theater based upon course of conduct of exhibiting 85 porno films in 17-month period under city abatement ordinance); petition for writ of certiorari to review trial court's refusal to hear case on merits, pending decision of California Supreme Court in Busch et al. v. Projection Room Theater et al. (infra), denied in Camil, City Attorney of Duarte v. Superior Court, No. 75-820, 424 U.S. 943, 47 L.Ed.2d 348, 96 S. Ct. 1410 (Mar. 1, 1976).

(3) Alabama ex rel. Sweeton v. General Corporation et al., (Motion picture theater continuous course of conduct - 8 films in 5-week period. Theater closed by trial court after trial on merits.) Alabama Supreme Court held Alabama Red Light Abatement Act did apply, but that closure of theater was unconstitutional in 294 Ala. 657,

320 So.2d 668 (Sept. 18, 1975); petition for writ of certiorari denied in Sweeton, Chief of Police of City of Huntsville v. General Corporation, No. 75-1011, 425 U.S. 905, 47 L.Ed.2d 753, 96 S.Ct. 1494 (Mar. 29, 1976).

(4) Commonwealth of Pennsylvania v. MacDonald (Complaint in Equity to abate "Deep Throat" and "Devil in Miss Jones" as a public nuisance under the Crimes Code and Red Light Abatement Act.) Pennsylvania Supreme Court held criminal definition of obscenity inadequate under Miller v. California and therefore civil action did not lie.) 464 Penn. 435, 347 A.2d 290, (Oct. 30, 1975); petition for writ of certiorari denied in Pennsylvania v. MacDonald, No. 75-1073, 429 U.S. 816, 50 L.Ed.2d 75, 97 S.Ct. 57 (Oct. 4, 1976).

1976 October Term

(1) People ex rel. Busch v. Projection Room Theater et al., 16 Cal.3d 360, 128 Cal.Rptr. 229 (Mar. 4, 1976) (Consolidated civil action to abate porno theaters and porno book stores for continuous course of conduct.) California Supreme Court held Red Light Abatement Act did not apply but that General Public Nuisance Statute did apply and left open the question of closure "since the U.S. Supreme Court has not yet spoken on this difficult question"; Opinion vacated and

replaced by opinion in 17 Cal.3d 42, 130 Cal.Rptr. 328 (June 1, 1976) holding to same effect except that closure provision was held, in dictum, to be unconstitutional; Petition for writ of certiorari denied in Van de Kamp, as District Attorney v. Projection Room Theater et al., No. 76-340, 428 U.S. 922, 50 L.Ed.2d 289, 97 S.Ct. 320 (Nov. 1, 1976).

(2) Sendak v. Nihiser dba Movieland Drive-In Theater affirmed in Sendak v. Nihiser dba Movieland Drive-In Theater, No. 76-675, 431 U.S. 961, 53 L.Ed.2d 1057, 97 S.Ct. 1057 (June 13, 1977).

(3) People ex rel. Camil, City Attorney of Duarte, California v. Buena Vista Cinema et al. (Complaint in Equity to abate a theater as a public nuisance under California Civil Code sections 3479 and 3480.) Petition for writ of certiorari to review the refusal of the trial court to grant relief after a hearing on a preliminary injunction and evidence showing a course of conduct of showing 200 pornographic films in a 2-year period, denied in California ex rel. Camil v. Superior Court (Buena Vista Cinema, real party in interest), No. 76-887, 429 U.S. 1097, 51 L.Ed.2d 544, 97 S.Ct. 1114 (Feb. 22, 1977). Compare the opposite result recently reached in In Re William Ward, 82 Cal.App.3d 974, 147 Cal.Rptr. 476 (July 20, 1978).

(4) Harmer et al. v. Motion Picture Film Entitled "The Devil in Miss Jones" (Complaint in Equity by private citizens to abate a pornographic film showing at a local theater as a public nuisance under California Civil Code sections 3479, 3480 and 3495.) Petition for writ of certiorari, to review decision of state court denying standing to bring action to abate film, denied in Harmer v. Motion Picture Film Entitled "The Devil in Miss Jones", No. 76-1110, 430 U.S. 967, 52 L.Ed.2d 359, 97 S.Ct. 1649 (Apr. 18, 1977).

(5) Harmer et al. v. Motion Picture Film Entitled "Deep Throat" (Complaint in Equity by private citizens to abate a pornographic film showing at a local theater as a public nuisance under California Civil Code sections 3479, 3480 and 3495.) Petition for writ of certiorari, to review decision of state court denying standing to bring action to abate film, denied in Harmer v. Motion Picture Film Entitled "Deep Throat", No. 76-1522, 432 U.S. 907, 53 L.Ed.2d 1079, 97 S.Ct. 2952 (June 20, 1977).

3. Other State Cases In Which The Common Law "Moral" Nuisance Of Obscenity Has Been Attacked By The General Public Nuisance Statute Or The Special Red Light Abatement Statute.

In addition to the above litigation which has gone all of the way to the U.S. Supreme Court,

the critical question as to whether or not the common law "moral" nuisance of obscenity can be reached either through the term "lewdness" of the Red Light Abatement Statutes or through the general public nuisance statutes as in People ex rel. Busch (supra), has become a burning issue in a number of other state cases.

In State of Michigan ex rel. Cahalan v. Diversified Theatrical et al., 229 N.W.2d 389 (Mar. 4, 1975) the Court of Appeals upheld the trial court ruling that the exhibition of the pornographic films "The Devil in Miss Jones", "It Happened in Hollywood", "Deep Throat" and "Little Sisters" did constitute "lewdness" under the Michigan Red Light Abatement Statute. The Michigan Supreme Court reversed that ruling, holding that the statute was not meant to apply, in 396 Mich. 244, 240 N.W.2d 460 (Apr. 1, 1976).

In State of Oklahoma ex rel. Field v. Hess dba Venus Book Mart, the trial court held that the sale of a book and 2 magazines on July 11, 1973, 2 magazines on July 18, 1973, and the exhibition of a film in a coin-operated machine on July 18, and July 19, 1973 did constitute a public nuisance under the general public nuisance statute, 50 O.S. 1971, sections 1, 2 and 8, and granted a permanent injunction enjoining the operation of the business. The Oklahoma Supreme Court

upheld the application of the general public nuisance statute to the transactions in question, but held the permanent injunction issued against the operation of the business to be too sweeping, and modified that portion of the judgment.

In the State of Texas, the attempt to develop controls against obscenity through the public nuisance statutes was frustrated by the action taken by the 3-judge federal district court below. In Universal Amusements Co. Inc. et al. v. Carol Vance et al., in the U.S. District Court for the Southern District of Texas, Houston Division, 404 F.Supp. 33 (June 3, 1975), a 3-judge court (Singleton, Ingraham and Taylor) consolidated 20 obscenity cases which included several public nuisance abatement actions. In King Arts Theater, plaintiff challenged the facial constitutionality of Article 4666, Vernon's Annotated Civil Statutes (providing for the abatement of public nuisances, and specifically, the inclusion, as a nuisance, of premises used for the purposes of commercial obscenity). The court disagreed with the conclusion of the Texas state court in Richards v. State, 497 S.W.2d 770, concerning the application of an injunction to movie houses. In a declaratory judgment, Article 4667(3) considered with articles 4665 and 4666 was held unconstitutional on its face. In the federal district court's

opinion, it operated as an invalid prior restraint on first amendment rights of those who commercially manufacture, distribute, or exhibit materials which may be thought by the state to be obscene but which have not yet been judicially determined to be obscene. On appeal, the Court of Appeals, 5th Cir. in Universal Amusement Co. et al. v. Vance et al. etc., (Sept. 28, 1977) reversed and construed the 1973 state statute differently, holding that the closure provision of the preceding section 4666 did not apply as a remedy in abating obscene exhibitions as nuisances and therefore that the nuisance provision, as thus construed, was constitutional. Later, that result was changed slightly by the Court of Appeals (en banc). The net result of such federal interference was to prevent public nuisance remedies from being developed in the State courts.

C. The Court Of Appeals Below Erroneously Disregarded The Memorandum Decision Of The U.S. Supreme Court In Art Theater Guild, Inc. et al. v. Ohio ex rel. Ewing ("Without A Stitch"). "Appeal Dismissed For Want Of A Substantial Federal Question."

In light of the background history of the "moral" public nuisance concept and the number of such public nuisance cases which have reached the docket of the U.S. Supreme Court in the past years, it is unreasonable to argue that this Court's brief memorandum decision in Art Theater

Guild Inc. et al. v. Ewing, 421 U.S. 923, 44 L.Ed. 2d 82, 95 S.Ct. 1649 (Apr. 21, 1975) should have no value as a precedent and should be treated as lightly as did the en banc court below. See 587 F.2d 159 at 165. The Art Theater Guild Inc. case is squarely in point as to the "closure" and bond provision in Article 4666. See Appendix D-1 to this brief.

In the Art Theater Guild Inc. case, this Court "dismissed for want of a substantial federal question" an appeal from the Ohio Supreme Court's decision in State ex rel. Ewing v. "Without A Stitch", 307 N.E.2d 911. Under Hicks v. Miranda, 422 U.S. 332, 45 L.Ed.2d 223, 95 S.Ct. 2281, 2289 (June 24, 1975), the Art Theater Guild Inc. decision was a ruling on the merits as to those issues which were decided by the State Court below. A review of the Ohio Supreme Court decision at page 917-918, clearly shows that an order closing a theater which exhibited a single obscene motion picture film for a substantial period of time is constitutionally valid, at least where a good faith owner could obtain a release by (a) appearing in court, (b) filing a bond in the full value of the property, and (c) demonstrating to the Court that he would prevent the nuisance from being reestablished (where the "nuisance" is regarded as

being the exhibition of the particular film declared to be obscene.)

In Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200, the U.S. Supreme Court again had occasion to refer to the "closure" provision of the Ohio Statute. There, the Court noted at page 497, that the narrowing construction of the Ohio Supreme Court in Ohio ex rel. Ewing v. A Motion Picture Film Entitled "Without A Stitch", supra, avoided the constitutional difficulty which concerned the U.S. District Court in the Huffman case, and, that the case did not fit "within the exception for statutes which are flagrantly and patently violative of express constitutional prohibitions.'" See also Huffman v. Pursue Ltd., supra, footnote 23 at 43 L.Ed.2d 497, which comments favorably upon the "closure" provision of the Ohio Red Light Abatement Statute, Ohio Rev. Code §3767.04 and §3767.06.

The Court of Appeals' opinion below holds that, under no circumstances, may a preliminary injunction or "padlock" penalty be issued. That result does not follow from any of this Court's decisions. It is one thing to say that an activity is "presumptively protected." It is an entirely different matter to say that the presumption is conclusive! The fallacy of applying such a rule

to businesses which continuously exhibit lewd "conduct" is logically demonstrated in the opinion of Associate Justice Burke, speaking for the majority of the New York Court of Appeals in Translux Dist. Corp. v. Bd. of Regents, 248 N.Y.S.2d 857 at 860 (Mar. 26, 1964).

> "If we can accept the obvious -- that sexual intercourse whether performed in the park or simulated on the stage or screen is in itself a form of conduct (in which the public have an interest), it is apparent that when this defendant chooses to use it as a vehicle for the expression of art it has 'brigaded' the communication (to the extent that it is 'communication') with conduct completely. In so doing the petitioner has subjected itself to such regulations as are appropriate to the conduct when engaged in for reasons having nothing to do with expression. There is otherwise no difference between advocacy and action. (Compare Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, with Local Union No. 10, etc., Plumbers Union v. Graham, 345 U.S. 192, 73 S.Ct. 585, 97 L.Ed. 946.) 'Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it' (Douglas, J., dissenting in Roth v. United States, 354 U.S. 476, 514, 77 S.Ct. 1304, 1324, 1 L.Ed.2d 1498)."

Judge Burke's closing principle at page 863 is a fitting memorial which should be engraved upon any court's reply to such argument:

> "To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say

> that artists are not such favorites of the law that they may ply their craft in the teeth of a declared overriding public policy against pornographic displays. Since no other profession is privileged to bend public morals, policy and law to its internal craft standards, then neither should producers of films".

In Busch, supra, the California Supreme Court similarly found no basis for such a distinction in the case of obscene publications, at p. 332:

> ". . . (W)e discern no satisfactory distinction which would justify differential treatment of the pictorial representations in obscene magazines and films on the one hand, and 'live' performances on the other. The presentation of either may fairly be described as 'indecent' and equally injurious to public morals. . . ."

The sexual conduct which is being portrayed on the motion picture screens across this nation in pornographic films like "Deep Throat" is the identical type of conduct that was proscribed as criminal in People v. Fixler, 56 Cal.App.3d 321, 128 Cal.Rptr. 363 at 365 (Mar. 17, 1976):

> "It seems self-evident that if A pays B to engage in sexual intercourse with C, then B is engaging in prostitution and that situation is not changed by the fact that A may stand by to observe the act or photograph it. A criminal act is not made any the less criminal by pictorial recordation of the act. (See People v. Zeihm, 40 Cal.App.3d 1085, 115 Cal.Rptr. 528)." (Our emphasis.)

Fixler is not an aberration in California law. See People v. Parker, 109 Cal.Rptr. 354 (Aug. 6,

1973) at page 358:

> ". . . We note at the outset that there is no evidence in the record before us which supports the conclusion that respondent's conduct in the instant case was "normal and natural and which is engaged in by a majority of adult citizens." The conduct referred to is that pertaining to the hiring and directing of professional performers to engage in acts of oral copulation in a semi-public place recorded by the camera for distribution to the general public through the media of the cinema. It is a reasonable inference that all involved including respondent expected to reap a financial return from the enterprise. The conduct of defendant may be defined as a form of commercial vice and not normal and natural sexual activity of consenting adults in private. Therefore we do not regard defendant's conduct as involving the exercise of a fundamental personal right protected by the Fourteenth Amendment."

See also, People v. Zeihm, 115 Cal.Rptr. 528, People v. American Art Enterprises, Inc., et al., 142 Cal.Rptr. 338 at 340 and Judge Hanson's discussion of Fixler at page 348-351.

There can be no question that the above-described type of public nuisance is regarded as a serious matter. Where the facts warrant, such unlawful conduct can be prosecuted under Penal Code Section 182 as a conspiracy (felony), which is a distinct offense from the misdemeanor obscenity crime described in Penal Code Section 311.2, People v. Haskin, 55 Cal.App.3d 231 at 242, 127 Cal.Rptr. 426, 433 (Mar. 3, 1976).

Three years ago, the application of the California public nuisance law to this type of criminal activity was made even clearer. See Weis v. Superior Court, 30 Cal.App. 730, 159 P. 465, cited with approval and applied to such conduct in motion picture films in People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 42, 49-50, 130 Cal.Rptr. at 332:

> "In Weis v. Superior Court (1916) 30 Cal. App. 730, 159 P. 464, the Court of Appeal ruled that an attraction known as the 'Sultan's Harem,' conducted at the Panama-California International Exposition, constituted a public nuisance subject to abatement. This exhibition assertedly involved the 'indecent and offensive' exposure to members of the public of the 'naked persons and private parts thereof' of various female employees. Although such conduct also constituted the crime of indecent exposure (Pen. Code, §311), nevertheless the Weis court held that '(w)here, however, the threatened acts, if committed, in addition to being an indictable offense, will constitute a public nuisance, courts of equity are vested with jurisdiction to interpose their injunctive process to prevent injury which will result from the maintenance thereof. (Citations.)' (Weis at p. 732, 159 P. at p. 464.) Furthermore, the court, quoting from Wood on Nuisances (§68), stated that '"A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the general good order and welfare of society, is a public nuisance. Under this head are included . . . obscene pictures, and any and all exhibitions, the

> natural tendency of which is to pander to vicious . . . and disorderly members of society."' (Ibid., italics added.)"
>
> "The foregoing Weis reasoning was approved by us more than 30 years ago in People v. Lim, (1941) 18 Cal.2d 872, 879, 118 P.2d 472. Lim involved the propriety of an injunction against gambling activities on the ground that they constituted a public nuisance. We upheld in Lim the use of the public nuisance injunctive remedy against gambling activity which, it was alleged, disturbed the public peace and corrupted public morals. In Lim we carefully traced the history of public nuisance actions and noted that 'The courts have . . . refused to grant injunctions on behalf of the state except where the objectionable activity can be brought within the terms of the statutory definition of public nuisance' (P. 879, 118 P.2d p. 476.) Although, as we noted, such activities as gambling or usury do not fit comfortably within the above quoted statutory definition of public nuisance, in Lim we acknowledged that an 'indecent' exhibition such as was involved in Weis could be enjoined despite the concurrent application of the criminal statutes, since such exhibitions if determined to be indecent are expressly declared by section 370 to be public nuisances."
>
> "While carefully noting that Weis involved live dance performances, we discern no satisfactory distinction which would justify differential treatment of the pictorial representation in obscene magazines and films on the one hand, and 'live' performances on the other. The presentation of either may fairly be described as 'indecent' and equally injurious to public morals." (Our emphasis.)

In the case of public nuisances, an equity trial court has traditional equity jurisdiction to enter preliminary injunctions and summary interlocutory "Closure" orders in "proper" cases. Those trial courts ought not to be automatically ousted of their traditional equity jurisdiction by the mere voicing of a "free speech" claim. More succinctly, a First Amendment issue is not raised every time a piece of soiled toilet paper is exposed to view in the Courtroom.

It seems quite clear from the Art Theater Guild case that the starting point for an equity court's jurisdiction is that it does have jurisdiction to enter an injunction and apply a "closure" penalty for past conduct where the same film continues to be exhibited after a trial on the merits has resulted in an obscenity verdict, and a determination that a "moral" public nuisance does presently exist. It seems equally as logical that the extreme limits of that Equity Jurisdiction cannot be discussed in the abstract, but depend upon the particular set of facts and the manner in which the statute is applied and what is proper and suitable to those facts. It should be noted that the majority of the California Supreme Court made this very point in its ruling in Busch, at page 339:

> "We emphasize that the proceedings now before us remain at the pleading stage. Having determined that plaintiffs' complaint is sufficient to state a cause of action based upon a general nuisance theory, we consider it inappropriate to describe in detail the precise dimensions of the injunctive and other relief which might be suitable in this and the related cases. It is enough that the parties and the trial court recognize that substantial constitutional issues are presented in this litigation, and that care must be exercised to assure that defendants' constitutional rights are not infringed. More than this is not required." (Our emphasis.)

While the Busch court did discuss the injunctive and closure remedies, it was in reply to the defendants' contention that a public nuisance action could not lie under Civil Code Sections 3479 and 3480 because of the "prior restraint" implications of the injunctive remedy, and it was in the background of the mandatory penalties of the California Red Light Abatement Statute, which had no "escape" provisions, such as are found in Article 4666 of the Civil Statutes of Texas. In its analysis, the Busch Court distinguished the "specific" forms of relief of the special California Red Light Abatement Law under which the action was brought (whose penalties are mandatory) and pointed out, in contrast, the flexibility inherent in the general public nuisance statute and Equity Courts upon which it upheld the Complaint, at page 337:

> "In order properly to evaluate defendants' prior restraint contention, we first

review the possible forms of relief available to plaintiffs in an ordinary public nuisance action. The public nuisance statutes, unlike the Red Light Abatement Law, do not provide for such specific forms of relief as temporary and perpetual injunction (Pen. Code, §11226-11227), removal and sale of fixtures, and closure of the premises for one year (Pen. Code, §112230). Instead, the district attorney or city attorney is, in general terms, empowered to bring a civil action to 'abate' the public nuisance. (Code Civ. Procedure, §731.) Further, 'An abatement of a nuisance is accomplished in a court of equity by means of an injunction proper and suitable to the facts of each case. . . .' (Italics added) Guttinger v. Calveras Cement Co. (1951) 105 Cal.App.2d 382, 390, 233 P.2d 914, 919; see generally McQuillin, Municipal Corporation §24.73.)"

The provisions of the California Red Light Abatement Statutes are but one expression of the inherent power of an Equity Court which are made mandatory by legislative directive. Ohio ex rel. Ewing v. "Without A Stitch", 307 N.E.2d 911, 917. While it is true that the California Supreme Court in Busch held that, as a matter of statutory construction, the California Red Light Abatement Statute was not meant to apply to obscene films, that Court also remarked, at page 340, that the legislative question was "not free from doubt." Compare Trans-lux Corporation v. State of Alabama ex rel. Sweeton, 366 So.2d 710 at 713 (Jan. 19, 1979) where the Alabama Supreme Court held differently regarding the matter of legislative

intent. The California Supreme Court in Busch, however, did not hold that the mandatory remedy of the Red Light Abatement Act, as interpreted by the Ohio Supreme Court in the Art Theater Guild, Inc. case, could not be adopted by a California Equity Court, in its discretion, in a "proper and suitable" case.

Amicus submits that the real concern of the majority of the Court in Busch and courts in other Red Light Abatement cases has been with the rigid strictures of the Red Light Abatement Statute, if such were to be applied automatically to cases involving legitimate First Amendment claims. Those apprehensions should not be felt where a specific statute compensates for such defects. All the Busch court was really saying was that it was foreclosing relief under the rigid California Red Light Abatement Act, which ousted the Equity Court of its traditional equity jurisdiction, and was authorizing the same abatement approach under the general public nuisance statute -- a result which allowed greater flexibility and more discretion in the trial judge. The Court's additional dictum in its second opinion on June 4, 1976, regarding cases which involved "legitimate" First Amendment claims, placed the focus in the wrong direction, and obscured the California Court's favorable citation of the two Ohio landmark cases, discussed hereafter,

which authorized the issuance of preliminary injunctions and closure orders in "proper" cases.

An examination of the McQuillin reference, Section 24.73 at pages 630-633, cited by the California Supreme Court in its analysis, provides no reason for believing that a preliminary injunction and closure would not be "proper and suitable" in California under other facts. The McQuillin text, which the Busch court referred to, points out at page 632 that:

> "The rule is otherwise as to businesses that are unlawful or inherently of potential menace to public order, safety, or morality, e.g., the operation of a gaming or disorderly house, which can be summarily abated by a municipality under resolution of the municipal legislative body. . . ."

Further, the Busch court noted at page 337:

> "Thus, in the matters before us if the trial court finds the subject matter obscene under prevailing law an injunctive order may be fashioned that is "proper and suitable" in each case. It is entirely permissible from a constitutional standpoint to enjoin further exhibition of specific magazines or films which have been finally adjudged to be obscene following a full adversary hearing. (Paris Adult Theatre I v. Slaton, supra, 413 U.S. 49, 54-55, 93 S.Ct. 2628, 37 L.Ed.2d 446 (approving Georgia abatement procedure); Grove Press, Inc. v. Flask, supra, 326 F.Supp. 574, 579; New Rivieria Arts Theater v. State, supra, 412 S.W.2d 890, 893-895; State ex rel. Ewing v. "Without A Stitch", supra, 307 N.E.2d 911, 914; State ex rel. Little Beaver Theatre, Inc. v. Tobin, supra, 258 So.2d 30, 32; State ex rel. Keating v. Vixen, supra, 272 N.E.2d 137; see Commonwealth v. Guild Theatre, Inc. (1968) 432 Pa. 378, 248 A.2d 45; Grove Press, Inc. v. City of Philadelphia (3d Cir. 1969) 418 F. 2d 82, 90-91; Sanders v. State, supra, 203 S.E.2d 153, 156-157)."

On the preliminary injunction issue, the California Supreme Court has since held that a preliminary injunction can be granted in such cases. See In Re William Ward, 82 Cal.App.3d 974, 147 Cal.Rptr. 476 (July 20, 1978). Hearing denied October 12, 1978. Further, the very page of State ex rel. Ewing v. "Without A Stitch" which the Busch court cited with approval (p. 914) specifically states that a preliminary injunction can be granted under Ohio law. At page 914, the Ohio Supreme Court stated:

> "At this point, it should be noted that R.C. 3767.01, et seq., do not provide for or allow censorship of films prior to a judicial determination of obscenity. Therefore, the United States Supreme Court decisions such as Freedman v. Maryland (1965), 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649, and Teitel Film Corp. v. Cusack (1968), 390 U.S. 139, 88 S.Ct. 754, 19 L.Ed.2d 966, which specify the constitutional requirements of such a system, are not applicable. Under R.C. 3767.01, et seq., the earliest point in time when the exhibition of a film may be enjoined is upon the granting of a temporary injunction. However, a temporary injunction can only be issued after a judicial hearing at which all the parties can present evidence on the allegation of obscenity." (Our emphasis.)

The Ohio Supreme Court in applying the "padlock" provision in State of Ohio ex rel. Ewing v. "Without A Stitch", 37 Ohio St.2d 95, 307, N.E.2d, 911, 917 (Feb. 24, 1974) surmounted the "in personam" obstacle by simply holding the obvious -- that the release provisions do not require the owner to show that, in the future, no film which will be exhibited during the one-year period will be obscene. The operator is simply required to account for his past conduct and to demonstrate that the nuisance, in whatever form, has been abated.

Under the Ohio Statute, after an adverse decision in the trial court and the preliminary injunction is to issue the losing litigant has an option as operator and "the person owning, in control, or in charge of the nuisance so enjoined." He can show "to the satisfaction of the court or judge that the nuisance complained of is abated," in which case, the court is not required to close the place against its use for the "lewdness" which had been found to exist. Under the Statute, the theater cannot be shut down unless the trial judge is convinced from evidence that the public nuisance is continuing and presently exists. The same condition exists in Texas. See Pittman et al. v. Texas, supra, at page 439. If, for example, the public nuisance is found to exist solely on the basis of

a film, such as "I Am Curious (Yellow)", and such showing is not representative of the course of conduct normally experienced, then it could not reasonably be said that a public nuisance exists if, at the time of the trial judge's finding and the preliminary injunction, the film is not showing, having been "pulled" by a responsible exhibitor.

By admitting that under the above set of circumstances such a ruling is proper under the statute, it does not follow therefrom that such would be proper in all cases. The clear intent of the statute is otherwise. Where, for example, the proof were that the operator has exhibited hard-core programs over a long period of time, the trial judge would be warranted in refusing to rule that the operator had met his burden of going forward with sufficient evidence to establish "to the satisfaction of the court that the nuisance had been abated." The trial judge could properly conclude that to accept such testimony, under the proof offered, would be to perpetuate a fraud on the court. See People of the State of California ex rel. Hicks v. Sarong Gals, 42 Cal.App. 556, 561, 117 Cal.Rptr. 24, 27 (October 18, 1974) where the California court noted that once the public nuisance has been established, the "burden of presenting evidence" (not the "burden of proof") that the public nuisance

had been abated shifted to the defendant:

> "Appellants next contend that the order of abatement was invalid because the nuisance had been abated. In support of their contention, they argue that no evidence was presented to establish violations of lewd conduct or obscenity statutes after December 15, 1970. The contention is without merit."
>
> "In the first place, evidence was introduced at the trial reporting a performance at the Sarong Gals on or about January 3, 1973, less than two weeks before the trial date, from which the trial court could conclude that the nuisance was continuing."
>
> "In the second place, once the People presented evidence to show that lewd acts had taken place at the Sarong Gals, it was incumbent upon appellants to present evidence showing that the nuisance had been abated. (See People v. Goddard, 47 Cal.App. 730, 734; People v. Macy, 43 Cal.App. 479, 483; People v. Dillman, 37 Cal.App. 415, 419-420.) It is a maxim of jurisprudence that '(a) thing continues to exist as long as is usual with things of that nature." (Civ. Code, 3547).) Appellants' reliance on People v. Goddard, supra, is misplaced. In Goddard, there was clear and uncontradicted evidence to show that the persons occupying the premises for immoral purposes vacated the premises three days before the filing of the Complaint. No similar showing was made here."

D. An Equity Court Has Inherent Power To Enjoin The Exhibition Of Specific Sexual Acts Performed In The Context Of Commercial Exploitation, Independent Of The Miller Test.

The Texas injunction in Richards v. Texas, supra, and Locke v. Texas, did not go far enough.

An equity court has inherent power to enjoin the exhibition of specific sexual acts which are performed in the context of commercial exploitation, independent of any need to consider the Miller test. See Ohio ex rel. Keating v. A Motion Picture Film Entitled "Vixen", 27 Ohio St.2d 78, 272 N.E.2d 137 at 141 (July 31, 1971), adhered to upon remand in 35 Ohio St.2d 215, 301 N.E.2d 215, 301 N.E.2d 880 (Sept. 26, 1973).

> "Doubt can no longer remain that the depiction of purported acts of sexual intercourse on the movie screen and the public exhibition thereof 'for commercial exploitation rather than for a genuine, scientific, educational, sociological, moral, or artistic purpose' is forbidden by Ohio law. Here, there is no dispute as to the fact that "Vixen" does depict numerous acts of purported sexual intercourse, and obviously it does so for a commercial purpose. No useful purpose could be served by remanding the cause to a lower court for consideration of the impact of those two statutes. We have the authority to 'render such judgment as * * * (the lower court) should have rendered.' Paragraph two of the syllabus in Peltz v. South Euclid (1967), 11 Ohio St. 2d 128, 228 N.E.2d 320, and paragraph three of the syllabus in Neil v. Neil (1883), 38 Ohio St. 558.
>
> "It follows that we have authority to render such judgment as the lower court would now be required to render, if the cause were remanded. Such authority is specifically given in Section 2(B)(1)(f), Article IV, Ohio Constitution.
>
> "Therefore, where scenes in a motion

picture film depict purported acts of sexual intercourse and are exhibited for commercial exploitation, those scenes are violative of R.C.§§2905.34 and 2905.35, constitute a 'nuisance' within the meaning of R.C. §3767.01, and their exhibition may be enjoined as provided in R.C.§3767.02 et seq.

"Insofar as it upholds the injunction against the exhibition of those portions of 'Vixen' which depict actual or purported acts of sexual intercourse, the judgment of the Court of Appeals is affirmed." (Our emphasis.)

Unless this Court so holds, the anomalous result described in Fixler, Zeihm, American Enterprise Inc. et al. and Haskin, discussed above, will continue unabated.

E. The Legislative Interpretation Given To Articles 4666 And 4667 Is Patently In Error. Statutes Having The Same Objective Must Be Read In Pari Materia.

What has happened in the Court of Appeals is obvious. In his dissent in the 3-judge decision on September 28, 1977, Judge Thornberry pointed out that "a plain reading of the applicable Texas statutes and of those cases calls for" Article 4666 and 4667(a)(3) to be read together and that to hold otherwise would arrive at a "strained interpretation of the two statutes." (Statement of Facts at page 29). Fifteen months later, but this time as the author of the en banc majority decision, Judge Thornberry, restated the same view (Statement of Facts at page 30) and then thereafter, refused to acknowledge that legislative intent.

The federal courts are bound by the decision of the Court of Civil Appeal in Pitman v. Texas, 234 S.W.2d 436 at 438 (October 26, 1950) which holds that article 4666 is a part of 4667:

"This article (4667) contemplates an action against a building, place or premises, in a sense, a condemnation of such where it is being used for gaming. The intent may be compared to an action to padlock certain premises, which universally are, and should be, pointed or singled out by some descriptive data to support an action for contempt of court. . ."

See also, Sutherland Statutory Construction, vol. 2A §51.03. Statutes having the same purpose or object are deemed to be in pari materia, at page 298; Texas v. Dyer, 145 Tex 568, 200 S.W.2d 813.

F. Since, Under Pitman v. Texas, And Articles 4666and 4667, The "Closure", Bond And Preliminary Injunction Remedies Are Imposed As An "In Rem" Judicial Remedy Against The Real Property, Rather Than An "In Personam" Remedy Against The Person, No First Amendment Question Is Presented.

Amicus submits that the proper construction of the "padlock" remedy of Article 4666 of the Civil Statutes of Texas is the rationale expressed in two recent decisions: (1) by the three-judge U.S. Federal District Court for the Southern District of Ohio, Western Division, in a case involving a book store, in Cincinnati Properties, Inc., et al., v. Leis et al., (unreported) (May 2, 1974), judgment vacated and remanded on other grounds in Marks v. Leis, 421 U.S. 940, 44 L.Ed.2d 96, 95 S.Ct. 1669 (April 28, 1975), and (2) by a majority of the Court of Appeal, Fourth District, Second Division, in a case involving "entertainment" in People ex rel. Hicks v. "Sarong Gals", 42 Cal.App.3d 556, 117 Cal.Rptr. 24 (October 18, 1974), hearing denied by the California Supreme Court on December 11, 1974.

(1) The Rational Employed in Cincinnati Properties Inc., et al., v. Leis et al.

In the Cincinnati Properties, Inc. case, supra, the Court was faced with the same issue which was presented in the Art Theater Guild case, except that there the three-judge Federal Court was considering an application of the "padlock" provisions of the Ohio Public Nuisance Statute, (O.R.C. sections 3767.01, et seq.) to an adult book store under the state trial court's interpretation that such constituted "lewdness" under the Red Light Abatement Statute. In upholding the "padlock" provision to that construction of the statute, that Court stated:

> "The plaintiffs' constitutional argument is this: A person is operating a bookstore containing a thousand different items each concedely presumptively protected by the First Amendment - a fair sampling of the 1,000 produces 50 which are subsequently the subject of an adversary judicial proceeding and found to be obscene. Any state remedy applied to the facts which prevents the operator from staying in business at that location and selling the other non-judicially examined materials is a prior restraint on the sale of those materials and therefore violates the First Amendment. We do not agree. The argument overlooks the right of the State, within constitutional bounds, to declare or define public nuisances and abate them. A state may, of course, in the exercise of its police powers, prohibit certain conduct. It is not questioned - whatever the difficulties of ascertainment - that the

states have power to prohibit obscenity and, within the Miller limits, to determine what is an is not. Kingsley v. Brown, 354 U.S. 436 (1967); United States v. Reidel, 402 U.S. 351 (1971); Miller v. California, 413 U.S. 15 (1973); Paris v. Slaton, 413 U.S. 49 (1973). Nor is it questioned that a state, having judicially determined that a given product is obscene, may validly enjoin the sale of that product by an individual, provide for its destruction and/or provide criminal sanction. The fallacy is in this sample example: A person possessing for sale one copy of one book concedely obscene and ten copies of a concedely non-obscene book is imprisoned for the former - during the term of imprisonment he is effectively stopped from dealing in non-obscene materials. Surely, it would not follow that the imprisonment was unconstitutional because it was a prior restraint respecting the innocent materials."

"From time immemorial states have chosen, in the exercise of their police power, to define certain action as illegal and, in addition, to define the place where certain prohibited activity is carried on as a "nuisance". The attendant remedy provided in such nuisance cases has been one against the place in which the activity has been carried on. This record is clear that the business of selling books and materials and offering shows was being carried on in the involved locations (see, for instance, the hundreds of publications contained in the 'Inventory' involved in No. 8714 (copy of the state court record attached to defendant Conroy's motion for summary judgment). No one questions that the sampling was a fair one and that sampling produced what is 100%, on this record, illegal and unprotected obscenity."

"The State of Ohio has seen fit to define as a nuisance, subject to abatement, a place in which obscenity is conducted. There being no question of fact that a business of obscenity was carried on the question in this case is, therefore, really whether the State may validly define the operation in the place as a nuisance and close it for a year - padlock it - on that basis. If it can, there is no prior restraint of the non-judicially-viewed material, except purely incidental. As Mr. Justice Frankfurter said in Kingsley, at page 441, 'the phrase "prior restraint" is not a self-wielding sword. Nor can it serve as a talismanic test.' The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weightly learning to his support of constitutionally protected liberties:"

"'What is needed', writes Professor Paul A. Freund, 'is a pragmatic assessment of it operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.'"

"The constitutional power of the State to abate what has been appropriately defined as a public 'nuisance' has never been seriously questioned. 'Padlock' remedies have been consistently provided for by most states in the areas of prostitution, gambling, and liquor violations. It is not for us to conclude that one or the other of these subjects vis-a-vis the State's padlock power should be classed differently than obscenity. Each is a proper object of the police power and not unrelated. To quote again from Kingsley, at page 441, the Supreme Court,

speaking in the area of dissemination of pornography, said:

> 'It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. (underscoring ours.) Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice.'

"Mugler v. Kansas, 123 U.S. 623 (1887) involved Kansas' first prohibition laws and, among others, a section providing, 'All places where intoxicating liquors are . . . sold . . . are declared to be common nuisances and upon the judgment of any court . . . finding such place to be a nuisance under this section, the sheriff . . . shall be directed to shut up and abate such place . . .' The place involved had been the subject of liquor sales. The Court, in upholding the constitutionality, said:

> 'The State, having authority to prohibit the . . . sale of intoxicating liquors . . . we do not doubt her power to declare any place kept and maintained for the illegal manufacture and sale of such, shall be deemed a common nuisance and to be abated, and, at the same time, to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes . . . The statute does not put the brand

> of a common nuisance upon any place, unless . . . that place is kept and maintained for purposes declared by the legislature to be injurious to the community.'
> (underscoring ours.)

"The padlocking provision of the Ohio statute is a time honored remedy involving the place -- it is not censorship or prior restraint."

2. The Rationale Employed in People of the State of California ex rel. Hicks v. "Sarong Gals".

In People of the State of California ex rel. Hicks v. "Sarong Gals", supra, the Court of Appeal, Fourth Appellate District, was construing an application of the California Red Light Abatement Statute. There, the trial court permanently enjoined certain parties from "maintaining, using or occupying the premises known as "Sarong Gals" for the purpose of "lewdness" and had closed the premises to all use for one year. In affirming the permanent injunction, the Court of Appeal analyzed the "padlock" provision as an "in rem" rather than an "in personam" remedy and the principal objective, the reformation of the property itself, as follows:

> "Appellants finally contend that the abatement order is overbroad and impinges upon their First Amendment right to present non-lewd dancing exhibitions at the Sarong Gals. Of course, just

as a court order for the incarceration of a convicted lawbreaker impinges on all sorts of constitutional rights, so does the abatement order. The order shutting down the property except for limited uses is specifically authorized, however, by Penal Code, section 11230 which permits the 'closing of the (offending) building . . . against its use for any purpose . . . for a period of one year, . . .' The question is, therefore, not whether the order impinges on constitutionally guaranteed rights, but whether the statute constitutes a permissible exercise of the state's police power. (Cf. Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal.2d 515, 530.)

"The purpose of Red Light Abatement proceedings is to abate a nuisance. Abatement of nuisances is a long established and well recognized exercise of the state's police power. (Board of Supervisors v. Simpson, 36 Cal.2d 671, 675; People v. Casa Co., 33 Cal.App. 194; People v. Barbiere, 33 Cal.App. 770, 775-776.) The provision in Penal Code, section 11230 authorizing closing of the offending property to all uses for a period of one year, while harsh, is constitutionally permissible. The Legislature could, and presumably did, consider the alternative of constant police surveillance of the offending premises too burdensome to the community. It is to be remembered that Red Light Abatement proceedings are directed against the offending property itself. Their purpose, it has been said, 'is to effect a reformation in the property itself.' (People v. Bayside Land Co., supra, 48 Cal.App. at p. 261.) Thus, while appellants are arguably denied

their right of First Amendment expression to some extent, they are denied such right only upon the specific property here involved and only for a limited period of time. They are in the meantime free to exercise their First Amendment rights at any other place. Moreover, appellants' restricted First Amendment rights are penumbral at best. The right to present non-lewd dancing for commercial purposes in a beer bar is hardly to be equated with the right to hold a town hall meeting (See Crownover v. Musick, supra, 9 Cal.3d at p. 414-426.) Thus, the interference with appellants' right to free expression is limited and easily overbalanced by the state's substantial interest in abating public nuisances." (Our emphasis.)

3. The Rationale Expressed in Marks v. Leis and the "Sarong Gals" case is further supported by tort law principles which authorize punitive damages where a tortfeaser is guilty of "malice" in maintaining the "moral" nuisance.

Further, as was stated at the outset, the public nuisance civil action embraces many different areas of the law and as many different kinds of remedies. The civil action is both an "at law" action under which both compensatory and punitive damages can be awarded, and an "equity" action, under which an injunction can be entered.

In ascertaining whether a punitive "closure" injunction may be proper as a penalty for past

conduct in maintaining a moral nuisance, it is useful to analyze and compare the remedies which are traditionally available in such "at law" and "equity" actions. Consider, for example, the hypothetical case of a wealthy tortfeasor who slant drills across adjacent property and takes oil at will from under neighboring property. In such a case, the injured landowner can sue in Equity for an injunction and at law for damages arising out of the tort (conversion). In those cases in which the superior position of the tortfeasor makes it impossible for the injured party to terminate a tortious invasion, done in reckless disregard for the injured party's rights, such as where the tortfeasor continues with such obvious tortious conduct, after notice, (malice) tort law permits the injured party, upon proper allegations of notice and malice, to seek punitive damages. The underlying theory for the imposition of punitive damages in such cases is to punish the tortfeasor for his past malicious conduct rather than compensate for the loss suffered by the injury party. In those cases where the evidence clearly demonstrates that the tortfeasor's conduct is malicious and cannot otherwise be halted, the jury is entitled to assess an extraordinary

amount of money as damages, to and including any amount which will assure the termination of the defendant's tortious conduct. Where the facts justify the penalty, he may even be put out of business.

Since it undeniably is proper under tort law to assess punitive damages in the nature of $600,000 to assure the termination of past malicious conduct which cannot otherwise be stopped under the law, Bertero v. National General Corporation, 13 Cal.3d 43, 65 118 Cal.Rptr. 184, 200 (Jan. 29, 1975), then certainly it should not be untoward for an Equity Court in a proper case to require a forfeiture of a leasehold interest in property (personalty) to effect the same result, where it is established to the satisfaction of the Equity Court, that the person in control of the moral public nuisance is guilty of "malice" in continuing to maintain such moral nuisance. See also 31 ALR3d 1346 "Punitive damages in actions based on nuisances".

G. The Restraints Which May Be Applied Under Articles 4666 and 4667(a)(3) Of The Civil Statutes Of Texas Are "Proper Restraints." They Are Not "Prior Restraints."

Not all restraints are evil. Freedom is not an absence of restraints. It is a composite of

systemized restraints. E. Barrett Prettyman, retired Chief Judge, U.S. Court of Appeals, phrased it thusly in a speech at Law Day observances, 1962, at the Pentagon (See Case and Comment, March-April 1963):

> "In an ordered society of mankind there is no such thing as unrestricted liberty, either of nations or of individuals. Liberty itself is the product of restraints; it is inherently a composite of restraints; it dies when restraints are withdrawn. Freedom, I say, is not an absence of restraints; it is a composite of restraints. There is no liberty without order. There is no order without systemized restraint. Restraints are the substance without which liberty does not exist. They are the essence of liberty. The great problem of the democratic process is not to strip men of restraints merely because they are restraints. The great problem is to design a system of restraints which will nurture the maximum development of man's capabilities, not in a massive glob of faceless animations but as a perfect realization of each separate human mind, soul, and body; not in mute, motionless mediation but in flashing, thrashing activity."

The rationale of the Court of Appeals below, which held that the potential "closure" and bond penalties of Article 4666, and the potential preliminary injunction which could issue under the Texas injunction procedures were unlawful "prior restraints" on free speech applies the same "chilling effect" argument which has been

advanced, at some point, in almost every obscenity case from Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (December 14, 1959), to the present time. An appropriate (but rarely cited) response to that "chilling effect" argument was made by U.S. District Court Judge George C. Young, dissenting from a three-judge court decision in Russ Meyer, et al. v. T. Edward Austin State Attorney for the Fourth Judicial Circuit et al., 319 F.Supp. 457, 475 (July 23, 1970):

> "'Chilling' of First Amendment rights is, of course, proscribed by the Constitution. But obscenity does not have such protection and the 'chilling' of obscenity is not only permissible but a legitimate interest of the state. The majority opinion expresses concern over the finding that the state proceeding 'chilled' the rights of Vixen's promoters. But who can say from the record that such 'chilling' was not justified in the state's efforts to suppress obscenity?" (Our emphasis).

Amicus submits that the "chilling effect" argument is inapposite, and that U.S. District Court Judge Young's remarks on that "score" state the correct rule of law which should be applied generally in obscenity cases.

H. Articles 4666 and 4667(a)(3) Of The Statutes Of Texas Which Provide Special Legislation For The Abatement Of The Public Nuisance Of Commercial Obscenity Meet The Test Set Fourth By This Court In U.S. v. O'Brien.

The Historical Right Of Local Governments To Enact "Moral" Public Nuisance Abatement Legislation Justified Any Incidental Limitation On First Amendment Freedom (Chilling Effect) That May Occur.

In U.S. v. O'Brien, 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673 (May 27, 1968), this Court laid down the following test where "speech" and "nonspeech" elements are combined in the same course of conduct, so as to draw in question the right of government to enact a law or regulation protecting a sufficiently important governmental interest (nonspeech) which may justify an incidental limitation on First Amendment (speech) freedoms. In O'Brien, supra, the Court stated at p. 376:

> "We cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' where the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms; compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment to section 12(b)(3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it."

In O'Brien, supra, this Court upheld a federal statute which penalized any person "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any" selective service registration certificate, as applied to O'Brien for his act of burning his registration certificate as "symbolic speech". The Court also upheld the constitutionality of the federal statute on its face as against a challenge that the purpose of Congress in enacting the amendment was "to suppress freedom of speech".

The historical right of governments to abate "moral" public nuisances, and the historical facts recited in the Statement of Facts herein

demonstrate that the four requirements set forth in U.S. v. O'Brien, supra, are met: (1) the regulation of "per se" moral public nuisances is within the constitutional powers of state government; (2) the abatement of a "per se" moral public nuisance is an indispensible part of government; (3) the governmental interest in the abatement of a business activity which, as a regular course of business, exhibits hard-core pornography, is clearly unrelated to the suppression of free speech, and (4) the remedies which are provided in Articles 4666 and 4667 are an incidental restriction on alleged First Amendment freedoms which is no greater than is essential to the furtherance of that interest in the light of the specific facts.

The Court of Appeals' contention that state government may not take action under its public nuisance abatement powers, in the manner provided for in the Texas statutes, because the same constitutues a "prior restraint" on free speech, fails to examine those governmental powers in the light of U.S. v. O'Brien, supra.

To accept the Court's broad general arguments re "prior restraint" would, as a practical matter, nullify the state government's time-honored powers to control such "per se" moral public

nuisances. It seems abundantly clear, however, that under the principles expressed in U.S. v. O'Brien, not every governmental action against an alleged moral public nuisance can be blindly attacked as a "prior restraint". Further, not every prior restraint (were such action to be interpreted as reaching the level of a "prior restraint") is an unlawful "prior restraint". As this Court stated in Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 43 L.Ed.2d 448, 95 S.Ct. 1239 at p.459:

> "Labelling respondents' action a prior restraint does not end the inquiry. Prior restraints are not unconstitutional per se . . ."

For a state's regulation, regarding such matters, to approach the level of an illegal "prior restraint" it would have to approach the level of regulation which was found to exist in Southeastern Promotions Ltd. v. Conrad, supra, 420 U.S. 546.

The major point of distinction between the constitutional cases on "prior restraint" recited in Southeastern Promotions Ltd. v. Conrad, 428 U.S. pp. 552 et seq. and the state statute and procedure under consideration herein is that, there, the evil railed against was administrative action which had the effect

of suppressing free speech without providing access to a court and a speedy judicial contest. The constitutional safeguards set forth in those cases is repeated in Southeastern Promotions Ltd., supra, at p. 459:

> "The settled rule is that a system of prior restraints 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of censorship system'. Freedman v. Maryland, 380 U.S. 51, 58, 13 L.Ed.2d 649, 85 S.Ct. 734 (1965). See United States v. Thirty-Seven Photographs, 402 U.S. 363, 367, 28 L.Ed.2d 822, 91 S.Ct. 1400 (1971); Blount v. Rizzi, 400 U.S. 410, 419-421, 27 L.Ed.2d 498, 91 S.Ct. 423 (1971); Teitel Film Corporation v. Cusack, 390 U.S. 139, 141-142, 19 L.Ed.2d 966, 88 S.Ct. 754 (1968). See also Heller v. New York, 413 U.S. 483, 489-490, 37 L.Ed.2d 745, 93 S.Ct. 2789 (1973); Bantam Books, Inc. v. Sullivan, 372 U.S., at 70-71, 9 L.Ed.2d 584; Kingsley Books, Inc. v. Brown, 354 U.S. 436, 1 L.Ed.2d 1469, 77 S.Ct. 1325 (1957). In Freedman the Court struck down a state's scheme for the licensing of motion pictures, holding 'that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint', 380 U.S., at 58, 13 L.Ed.2d 649. We held in Freedman, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to a judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured." (Our emphasis.)

Those infirmities do not exist here where the primary objective is to get the controversy into the Courts for an immediate determination on the merits.

The major point which distinguishes proper governmental action in such situations from the unlawful "prior restraint" context is set forth in Southeastern Promotions Ltd. at p. 459:

> "The presumption against prior restraints is heavier - and the degree of protection broader - than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law then to throttle them and all others beforehand . . ."

The further caviat of the Southeastern Promotions Ltd. case, also voiced at p. 459 reading:

> "In order to be held lawful, respondents' action, first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and, second, must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally

protected speech . . ."
is fully satisfied by the legislative provision which confronts this court.

Were this Court to accept the Court of Appeals' rationale that "prior restraint" is a factor to be reckoned with judicial proceedings because of the "chilling effect", that same argument could be applied with equal force to nullify any obscenity statute or ordinance which established a criminal penalty for the exhibition of an obscene film, and applied that criminal penalty after the violation had been established in a judicial contest. If the public nuisance action is to be regarded as a "prior restraint" because of its "chilling effect" on the appellee's conduct, why then would not also the enactment of an obscenity ordinance which precipitated an arrest for an obscenity violation constitute a "prior restraint" under the same principles? The latter argument has often been urged in the Courtroom but, thus far, has never succeeded. See, for example, the assessment of the trial court in State Cinema of Pittsfield Inc., v. Ryan, 303 F.Supp. 597, where a district attorney threatened seizure of the film and an arrest for violation of the State obscenity statute if the film "Vixen" were shown,

affirmed in State Cinema of Pittsfield Inc., v. Ryan, 422 F.2d 1400 (March 27, 1970), petition for writ of certiorari denied in 400 U.S. 850, 27 L.Ed.2d 87, 91 S.Ct. 51 (October 12, 1970).

Amicus submits that to accept the Court of Appeals rationale on "prior restraint" is to deny that an equity court has the inherent judicial power to deal with modern day equity problems. Further, a federal appellate decision which applies that rationale in a state case is unconstitutional, being an interference with the lawful equity powers of the state judicial system.

CONCLUSION

Wherefore, amicus curiae prays that this Honorable Court reverse the judgment of the Court of Appeals below and rule as follows:

1. Where a state statute is constitutional on its face, and can be rendered constitutional by further interpretation by a state court, a federal court lacks jurisdiction to construe such statute in the first instance. U.S. v. 37 Photographs, 402 U.S. 363, 369 28 L.Ed.2d 822, 91 S.Ct. 1400 (1971)
2. Under ruling Texas decisions, articles 4666 and 4667 of the Civil Statutes of Texas are in pari materia and must be

construed together. Pitman v. Texas, 234 S.W.2d 436 at 438 (October 26, 1950).

3. The "closure" provision of article 4666 of the Civil Statutes of Texas is constitutional on its face. This holding is controlled by the U.S. Supreme Court decisions in Huffman v. Pursue Ltd., 420 U.S. 592 at 612, 43 L.Ed.2d 482 at 496, 95 S.Ct. 1200 (March 18, 1975) and the subsequent memorandum decision in Art Theater Guild Inc., et al., v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (April 21, 1975).

4. The restraints which may be applied under articles 4666 and 4667(a)(3) of the Civil Statutes of Texas and procedural statutes governing the issuance of injunctions are "judicial" restraints and, as such, are "proper" restraints. They do not come within the rule against "prior restraints" expressed in Freedman v. Maryland which applies to "administrative" restraints.

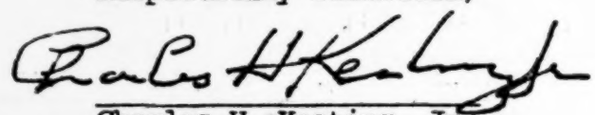
5. Articles 4666 and 4667(a)(3) of the Civil Statutes of Texas meet the test expressed in U.S. v. O'Brien, 391 U.S.

367, 20 L.Ed.2d 672, 88 S.Ct. 1673 (May 27, 1968) in regard to the right of government to enact a law protecting a sufficiently important governmental interest (moral public nuisance abatement) which may justify an incidental limitation on First Amendment freedoms.

6. An Equity Court has inherent power to enjoin the exhibition of specific sexual acts performed in the context of commercial exploitation, independent of the Miller v. California test for obscenity.

Dated: August 24, 1979

Respectfully submitted,



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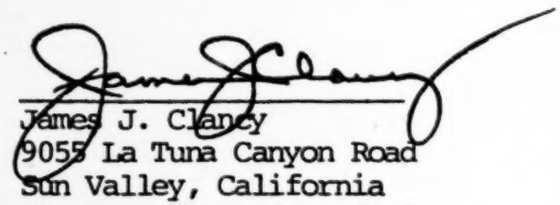

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CERTIFICIATE OF SERVICE

I, hereby certify that on this 24th day of August 1979, copies of the within Motion of Charles H. Keating, Jr., for Leave to File a Brief as Amicus Curiae in Support of Appellants were mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

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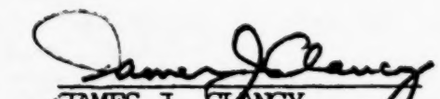

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APPENDIX A

(REFERENCE: AMICUS CURIAE BRIEF AT PAGE 5.71)

Title 52, Chapters 1 and 4 - Nuisances - of the Idaho Code, as added by S.L. 1976, Ch 82 . . . . . A-1 thru A-11

Title 7, Chapter 7.48 - Nuisances- of the Revised Code of Washington annotated, as enacted by Initiative Measure No. 335 #20 approved November 8, 1977. . . . . A-13 thru A-26

Chapter 19, Article 1 - Abatement of nuisances - of the North Carolina General Statutes, as added by Session Laws 1977, C 819, effective August 1, 1977 . . . . . A-27 thru A-34

Chapter 7, Article 1.1 - Obscene Movie and Obscene Pictorial Publication Abatement - of the Arizona Revised Code, added by Laws 1977, Ch. 125, effective May 31, 1977 . . . . . A-35 thru A-38

TITLE 52—NUISANCES

CHAPTER.
1. NUISANCES IN GENERAL, §§ 52-101—52-111.
4. MORAL NUISANCES — ACTION FOR INJUNCTION AND ABATEMENT, §§ 52-401—52-417.

CHAPTER 1—NUISANCES IN GENERAL

SECTION.
52-101. Nuisance defined.
52-102. Public nuisance.
52-103. Moral nuisances — Definitions.
52-104. Moral nuisances—Types.
52-105. Moral nuisances — Personal property — Knowledge of nuisance.
52-106. Moral nuisances — Building where gambling is carried on.
52-107. Private nuisance.
52-108. When not a nuisance.
52-109. Liability of successive owners for continuing nuisance.
52-110. Abatement does not preclude action.
52-111. Actions for nuisance.

52-101. Nuisance defined.—Anything which is injurious to health or morals, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance. [I. C., § 52-101, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. This chapter, as it appears in the bound volume which comprised C. C. P. 1881, § 471, R. S., §§ 3620-3625, 4529; reen. R. C., §§ 3656, 3657; R. C., §§ 3657a-3657c, as added by 1915, ch. 43, § 2, p. 125; reen. R. C., §§ 3658-3661; R. C., § 4529; am. 1915, ch. 43, §§ 1, 3, 5, p. 125; reen. C. L., §§ 3656-3661, 4529; 1919, ch. 97, p. 361; C. S., §§ 6420-6429, 6956; I. C. A., §§ 51-101—51-111, was repealed by S. L. 1976, ch. 82, § 1 and the present chapter substituted therefor.

DECISIONS UNDER PRIOR LAW

ANALYSIS

Burden of proof.
Instructions.
Obstruction of nonnavigable stream.
Sewage disposal facilities.
Softball field lights.
Streets and sidewalks.

Burden of Proof.

In order to obtain an injunction against or the abatement of an alleged nuisance the complaining party must show a clear case supporting his right to relief. Larsen v. Village of Lava Hot Springs, 88 Idaho 64, 396 Pac. (2d) 471.

Instructions.

The giving of instructions to the jury on the issue of nuisance was not erroneous as raising an issue not pleaded in the complaint where the complaint charged the defendant with acts and conditions which would constitute a nuisance under this section. Archer v. Shields Lumber Co., 91 Idaho 861, 434 Pac. (2d) 79.

Obstruction of Nonnavigable Stream.

Defendant, upstream owner, a junior appropriator of water rights, had no right to damages from plaintiffs, a downstream owner, a prior appropriator, and users of water in his ditch, for removal of dam which was constructed by upstream owner, since the dam constituted a private nuisance and it was plaintiff's right to abate it. Ward v. Kidd, 87 Idaho 216, 392 Pac. (2d) 183.

Where plaintiff was entitled to water and dam constituted a private nuisance it was plaintiff's right to abate it and defendant was not entitled to damages resulting from removal of the obstruction by plaintiffs. The equipment plaintiffs took to the site crossed over sagebrush land causing no injury and they had a right to reasonable access to the channel to secure and safeguard their water right. Ward v. Kidd, 87 Idaho 216, 392 Pac. (2d) 183.

Sewage Disposal Facilities.

As a municipal corporation, the village possessed legislatively delegated power

to construct, operate and maintain sewage disposal facilities and to issue its bonds for the purpose of acquiring and constructing sewage treatment and disposal plants, together with lands and appurtenances. Larsen v. Village of Lava Hot Springs, 88 Idaho 64, 396 Pac. (2d) 471.

A sewage disposal facility, legal in its inception, is not a nuisance per se, and its location and the manner of its operation will determine whether it is a nuisance in fact. Larsen v. Village of Lava Hot Springs, 88 Idaho 64, 896 Pac. (2d) 471.

In proceedings for injunction against lagoon-type sewage disposal plant, evidence was insufficient to show that the lagoons, if constructed as proposed, would be located or operated so as to constitute a nuisance. Larsen v. Village of Lava Hot Springs, 88 Idaho 64, 396 Pac. (2d) 471.

Softball Field Lights.

A church softball field lighted by high-intensity lights was not a nuisance where use was restricted to the hours between 7:00 a.m. and 10:00 p.m. Corporation of the Presiding Bishop ex rel. Ashton v. Idaho Falls, 92 Idaho 571, 448 Pac. (2d) 185.

Streets and Sidewalks.

The maintenance of a street with its terminus upon the bank of a river with a barrier erected thereat was not a nuisance for there was no defect which obstructed free passage or use of the street in the customary manner. Smith v. Sharp, 82 Idaho 420, 354 Pac. (2d) 172.

52-102. Public nuisance.—A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. [I. C., § 52-102, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-101.

52-103. Moral nuisances—Definitions.—As used in title 52, Idaho Code, relating to moral nuisances.

(A) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in the lewd matter, or knowledge of the acts of lewdness, assignation, or prostitution which occur on the premises.

(B) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(1) which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(2) which depicts or describes patently offensive representations or descriptions of:

(a) ultimate sexual acts, normal or perverted, actual or simulated; or

(b) masturbation, excretory functions, or lewd exhibition of the genitals or genital area.

Nothing herein contained is intended to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value.

(C) "Lewdness" shall have and include all those meanings which are assigned to it under the common law.

(D) "Matter" means a motion picture film or a publication or both.

(E) "Moral nuisance" means a nuisance which is injurious to public morals.

(F) "Motion picture film" shall include any:

(1) film or plate negative;

(2) film or plate positive;

(3) film designed to be projected on a screen for exhibition;

(4) films, glass slides or transparencies, either in negative or positive form, designed for exhibition by projection on a screen.

(5) video tape or any other medium used to electronically reproduce images on a screen.

(G) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(H) "Place" includes, but is not limited to, any building, structure or places, or any separate part or portion thereof, whether permanent or not, or the ground itself.

(I) "Publication" shall include any book, magazine, article, pamphlet, writing, printing, illustration, picture, sound recording, or a motion picture film which is offered for sale or exhibited in a coin-operated machine.

(J) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer or possession of, lewd matter. [I. C., § 52-103, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-101.

52-104. Moral nuisances—Types.—The following are declared to be moral nuisances:

(A) Any and every place in the state where lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition;

(B) Any and every place in the state where a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition;

(C) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a moral nuisance under this section;

(D) Any and every place of business in the state in which lewd publications constitute a principal part of the stock in trade;

(E) Any and every lewd publication possessed at a place which is a moral nuisance under this section; and

(F) Every place which, as a regular course of business, is used for the purposes of lewdness, assignation, or prostitution, and every such place in or upon which acts of lewdness, assignation, or prostitution, are held or occur. [I. C., § 52-104, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-101.

Sec. to sec. ref. Sections 52-104, 52-105 are referred to in § 52-415.

52-105. Moral nuisances—Personal property—Knowledge of nuisance.—The following are also declared to be moral nuisances, as personal property used in conducting and maintaining a moral nuisance:

(A) All moneys paid as admission price to the exhibition of any lewd film found to be a moral nuisance.

(B) All valuable consideration received for the sale of any lewd publication which is found to be a moral nuisance.

(C) The furniture and movable contents of a place which is a moral nuisance.

From and after service of a copy of the notice of hearing of the application for a preliminary injunction, provided for in section 52-405, Idaho Code, upon the place, or its manager, or acting manager, or person then in charge, all such parties are deemed to have knowledge of the acts, conditions or things which make such place a moral nuisance. Where the circumstantial proof warrants a determination that a person had knowledge of the moral nuisance prior to such service of process, the court shall make such finding. [I. C., § 52-105, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-101.

52-106. Moral nuisances—Building where gambling is carried on.—Any building, place, or the ground itself, wherein or whereon gambling or any game of chance for money, checks, credit or other representatives of value is carried on or takes place, or gambling paraphernalia is kept, or any notice, sign or device advertising or indicating the existence or presence of such gambling or any game of chance is displayed or exposed to view, is declared a moral nuisance and shall be enjoined and abated as provided by law. [I. C., § 52-106, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-101.

52-107. Private nuisance.—Every nuisance not defined by law as a public nuisance or a moral nuisance, is private. [I. C., § 52-107, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-101.

52-108. When not a nuisance.—Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance. [I. C., § 52-108, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-101.

52-109. Liability of successive owners for continuing nuisance.—Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property, created by a former owner, is liable therefor in the same manner as the one (1) who first created it. [I. C., § 52-109, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-101.

52-110. Abatement does not preclude action.—The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence. [I. C., § 52-110, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-101.

52-111. Actions for nuisance.—Anything which is injurious to health or morals, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an

action. In the case of a moral nuisance, the action may be brought by any resident citizen of the county; in all other cases the action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered. [I. C., § 52-111, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-101.

Section 3 of S. L. 1976, ch. 82, repealed former §§ 52-401—52-410, and § 4 of S. L. 1976, ch. 82, is compiled herein as the present §§ 52-401—52-417.

DECISIONS UNDER PRIOR LAW

Instructions.

The giving of instructions to the jury on issue of nuisance was not erroneous as raising an issue not pleaded in the complaint where the complaint charged the defendant with acts and conditions which would constitute a nuisance under this section. Archer v. Shields Lumber Co., 91 Idaho 861, 434 Pac. (2d) 79.

CHAPTER 3—PRIVATE NUISANCES

52-302. Abatement—When allowed.

Obstruction of Nonnavigable Stream.

Defendant upstream owner, a junior appropriator of water rights, had no right to damages from plaintiffs, a downstream owner, a prior appropriator, and users of water in his ditch, for removal of dam which was constructed by upstream owner, since the dam constituted a private nuisance and it was plaintiffs' right to abate it. Ward v. Kidd, 87 Idaho 216, 392 Pac. (2d) 183.

Where plaintiff was entitled to water, and dam constituted private nuisance, it was plaintiff's right to abate it and defendant was not entitled to damages resulting from removal of the obstruction by plaintiffs. The equipment plaintiffs took to the site crossed over sagebrush land causing no injury and they had a right to reasonable access to the channel to secure and safeguard their water right. Ward v. Kidd, 87 Idaho 216, 392 Pac. (2d) 183.

CHAPTER 4—MORAL NUISANCES—ACTION FOR INJUNCTION AND ABATEMENT

SECTION.
52-401. Cumulative remedy.
52-402. Who may maintain action.
52-403. Pleadings — Jurisdiction — Venue — Application for temporary injunction.
52-404. Order restraining removal of personal property from premises — Service — Punishment.
52-405. Notice of hearing on temporary injunction — Consolidation.
52-406. Right to possession of real property and personal property after hearing on the temporary injunction — Conditions for avoidance of temporary forfeiture.
52-407. Right to possession of real property and personal property after finding of public nuisance — Conditions for reentry and repossession.
52-408. Priority of action.
52-409. Evidence.
52-410. Evidence of reputation admissible.
52-411. Costs.
52-412. Content of final judgment and order.
52-413. Court shall punish offender for violation of injunction or order.
52-414. Lease void if building used for lewd purposes.
52-415. Civil penalty — Forfeiture — Accounting — Lien as to expenses of abatement.
52-416. Immunity.
52-417. Severability.

52-401. Cumulative remedy.—In addition to any other remedy provided by law, any act, occupation, structure or thing which is a moral nuisance, may be abated, and the person doing such act or engaged in such occupation, and the owner and agent of the owner of any such

structure or thing may be enjoined, as in this chapter provided. [I. C., § 52-401, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. This chapter, as it appears in the bound volume which comprised R. C., § 4628a-4628j, as added by 1915, ch. 43, § 6, p. 125; reen. C. L., §§ 4628a-4628j; C. S., §§ 7042-7051; I. C. A., §§ 51-401—51-410, was repealed by S. L. 1976, ch. 82, § 3 and the present chapter substituted therefor.

Section 2 of S. L. 1976, ch. 82, is compiled herein as §§ 52-101—52-111.

52-402. Who may maintain action.—The attorney general, prosecuting attorney, or any private resident citizen of the county may maintain an action of an equitable nature, as relator, in the name of the state of Idaho, to abate a moral nuisance, perpetually to enjoin all persons from maintaining the same, and to enjoin the use of any structure or thing adjudged to be a moral nuisance.

If such action is instituted by a private person, the complainant shall execute a bond prior to the issuance of a restraining order or a temporary injunction, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than five hundred dollars ($500), to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not maintained, or if it is finally decided that the restraining order or temporary injunction ought not to have been granted. The party enjoined shall have recourse against said bond for all damages suffered, including damages to his property, person, or character and including reasonable attorney's fees incurred by him in making defense to said action. No bond shall be required of the prosecuting attorney or the attorney general, and no action shall be maintained against the public official for his official action when brought in good faith. [I. C., § 52-402, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-401.

52-403. Pleadings — Jurisdiction — Venue — Application for temporary injunction.—The action, provided for in this chapter, shall be brought in any court of competent jurisdiction in the county in which the property is located. Such action shall be commenced by the filing of a verified complaint alleging the facts constituting the nuisance. After the filing of said complaint, application for a temporary injunction may be made to the court in which the action is filed, or to a judge thereof, who shall grant a hearing within ten (10) days after the filing. [I. C., § 52-403, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-401.

52-404. Order restraining removal of personal property from premises—Service—Punishment.—Where such application for a temporary injunction is made, the court may, on application of the complainant showing good cause, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon, except that, pending such decision, the stock in trade may not be so restrained, but an inventory and full accounting of all business transactions thereafter may be required.

The restraining order may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a copy thereof in a conspicuous place at or upon

one or more of the principal doors or entrances to such place, or by both such delivery and posting. The officer serving such restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance.

Any violation of such restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of court, provided such posted order contains therein a notice to that effect. [I. C., § 52-404, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-401.

Sec. to sec. ref. This section is referred to in § 52-406.

52-405. Notice of hearing on temporary injunction—Consolidation.—A copy of the complaint, together with a notice of the time and place of the hearing of the application for a temporary injunction, shall be served upon the defendant at least five (5) days before such hearing. The place may also be served by posting such papers in the same manner as is provided for in section 52-404, Idaho Code, in the case of a restraining order. If the hearing is then continued at the instance of any defendant, the temporary writ as prayed shall be granted as a matter of course.

Before or after the commencement of the hearing of an application for a temporary injunction, the court, on application of either of the parties or on its own motion, may order the trial of the action on the merits to be advanced and consolidated with the hearing on the application for the temporary injunction. Any evidence received upon an application for a temporary injunction which would be admissible upon the trial on the merits becomes a part of the record of the trial and need not be repeated as to such parties at the trial on the merits. [I. C., § 52-405, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-401.

Sec. to sec. ref. This section is referred to in §§ 52-105, 52-415.

52-406. Right to possession of real property and personal property after hearing on the temporary injunction—Conditions for avoidance of temporary forfeiture.—If upon hearing, the allegations of the complaint are sustained to the satisfaction of the court, the court shall issue a temporary injunction, without additional bond, restraining the defendant and any other person from continuing the nuisance.

If at the time the temporary injunction is granted, it further appears that the person owning, in control, or in charge of the nuisance so enjoined had received five (5) days' notice of the hearing, then the court shall declare a temporary forfeiture of the use of the real property upon which such public nuisance is located and the personal property located therein and shall forthwith issue an order closing such place against its use for any purpose until final decision is rendered on the application for a permanent injunction, unless:

(1) the person owning, in control, or in charge of such nuisance shows to the satisfaction of the court or judge, by competent and admissible evidence which is subject to cross-examination, that the nuisance complained of has been abated by such person, or

(2) the owner of such property, as a "good faith" lessor, has taken action to void said lease as is authorized by section 52-414, Idaho Code.

Such order shall also continue in effect for such further period the order, authorized in section 52-404, Idaho Code, restraining the removal

of personal property or, if not so issued, shall include such an order restraining for such period the removal or interference with the personal property and contents located therein. Such restraining order shall be served and the inventory of such property shall be made and filed as provided for in section 52-404, Idaho Code.

Such order shall also require such persons to show cause within thirty (30) days why such closing order should not be made permanent, as provided for in section 52-412, Idaho Code. [I. C., § 52-406, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-401.

Sec. to sec. ref. Sections 52-406, 52-407 are referred to in § 52-412.

52-407. Right to possession of real property and personal property after finding of public nuisance—Conditions for reentry and repossession.—The owner of any real or personal property to be closed or restrained or which has been closed or restrained, may appear between the filing of the complaint and the hearing on the application for a permanent injunction, and upon payment of all cost incurred and upon the filing of a bond by the owner of the real property with sureties to be approved by the clerk in the full value of the property to be ascertained by the court, conditioned that such owner will immediately abate the nuisance and prevent the same from being established or kept, until the decision of the court is rendered on the application for a permanent injunction, then the court, if satisfied of the good faith of the owner of the real property and of the innocence on the part of any owner of the personal property of any knowledge of the use of such personal property as a nuisance and that, with reasonable care and diligence, such owner could not have known thereof shall, at the time of the hearing on the application for the temporary injunction, refrain from issuing any order closing such real property or restraining the removal or interference with such personal property, and, if such temporary injunction has already been issued, shall discharge said order and shall deliver such real or personal property, or both, to the respective owners thereof. The release of any real or personal property, under this section, shall not release it from any judgment, lien, penalty, or liability to which it may be subjected. [I. C., § 52-407, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-401.

52-408. Priority of action.—The action provided for in this chapter shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions. [I. C., § 52-408, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-401.

52-409. Evidence.—In such action, an admission or finding of guilty of any person under the criminal laws against lewdness, prostitution, or assignation at any such place, is admissible for the purpose of proving the existence of said nuisance, and is prima facie evidence of such nuisance and of knowledge of, and of acquiescence and participation therein, on the part of the person charged with maintaining said nuisance. [I. C., § 52-409, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-401.

52-410. Evidence of reputation admissible.—At all hearings upon the merits, evidence of the general reputation of the building or place constituting the alleged nuisance, of the inmates thereof, and of those resorting thereto, is admissible for the purpose of proving the existence of such nuisance. [I. C., § 52-410, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-401.

52-411. Costs.—If the action is brought by a private person and the court finds that there were no reasonable grounds or probable cause for bringing said action, and the case is dismissed for that reason before trial, or if the action is dismissed for want of prosecution, the costs may be taxed to such person.

If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of, and the defendant from maintaining such nuisance elsewhere, and the entire expenses of such abatement, including attorney's fees, shall be recoverable by plaintiff as a part of his costs of the lawsuit.

If the complaint is filed by a private person, it shall not be voluntarily dismissed except upon a sworn statement by the complainant and his attorney, setting forth the reason why the action should be dismissed and the dismissal approved by the prosecuting attorney in writing or in open court. If the judge is of the opinion that the action ought not to be dismissed, he may direct the prosecuting attorney to prosecute said action to judgment at the expense of the county, and if the action is continued more than one term of court, any person who is a citizen of the county, or has an office therein, or the attorney general or the prosecuting attorney, may be substituted for the complainant and prosecute said action to judgment. [I. C., § 52-411, as added by 1976, ch. 82, § 4, p. 270.]

52-412. Content of final judgment and order.—If the existence of a nuisance is admitted or established in an action as provided for in this chapter, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court, as provided for in sections 52-406 and 52-407, Idaho Code, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Lewd matter shall be destroyed and not be sold.

Such order shall also require the renewal for one (1) year of any bond furnished by the owner of the real property, as provided in section 52-407, Idaho Code, or, if not so furnished, shall continue for one (1) year any closing order issued at the time of granting the temporary injunction, or, if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose, and keeping it closed for a period of one (1) year unless sooner released.

The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in section 52-407, Idaho Code.

Owners of unsold personal property and contents so seized must appear and claim the same within ten (10) days after such order of abatement is made, and prove innocence, to the satisfaction of the

court, of any knowledge of said use thereof, and that with reasonable care and diligence they could not have known thereof. If such innocence is established, such unsold personal property and contents shall be delivered to the owner, otherwise it shall be sold as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; and for closing the place and keeping it closed, a reasonable sum shall be allowed by the court. [I. C., § 52-412, as added by 1976, ch. 82, § 4, p. 270.]

Sec. to sec. ref. This section is referred to in § 52-406.

52-413. Court shall punish offender for violation of injunction or order.—In case of the violation of any injunction or closing order, granted under this chapter, or of a restraining order or the commission of any contempt of court in proceedings under this chapter, the court may summarily try and punish the offender. The trial may be had upon affidavits or either party may demand the production and oral examination of the witnesses. [I. C., § 52-413, as added by 1976, ch. 82, § 4, p. 270.]

52-414. Lease void if building used for lewd purposes.—If a tenant or occupant of a building or tenement, under a lawful title, uses such place for the purposes of lewdness, assignation, or prostitution, such use makes void the lease or other title under which he holds, at the option of the owner, and, without any act of the owner, causes the right of possession to revert and vest in such owner, who may without process of law make immediate entry upon the premises. [I. C., § 52-414, as added by 1976, ch. 82, § 4, p. 270.]

Sec. to sec. ref. This section is referred to in § 52-406.

52-415. Civil penalty — Forfeiture — Accounting — Lien as to expenses of abatement.—Lewd matter is contraband, and there are no property rights therein. All personal property declared to be a moral nuisance in section 52-104, Idaho Code, and all moneys and other considerations declared to be a moral nuisance under section 52-105, Idaho Code, are the subject of forfeiture to the local government and are recoverable as damages in the county wherein such matter is sold, exhibited or otherwise used. Such moneys may be traced to and shall be recoverable from persons who, under section 52-405, Idaho Code, have knowledge of the nuisance at the time such moneys are received by them.

Upon judgment against the defendants in legal proceedings brought pursuant to this chapter, an accounting shall be made by such defendant or defendants of all moneys received by them which have been declared to be a public nuisance under this section. An amount equal to the sum of all moneys estimated to have been taken in as gross income from such unlawful commercial activity shall be forfeited to the general funds of the city and county governments wherein such matter is sold or exhibited, to be shared equally, as a forfeiture of the fruits of an unlawful enterprise, and as partial restitution for damages done to the public welfare, public health and public morals.

Where the action is brought pursuant to this chapter, special injury need not be proven, and the costs of abatement are a lien on both the real and personal property used in maintaining the nuisance. Costs of abatement include, but are not limited to the following:

(1) investigative costs.

(2) court costs.

(3) reasonable attorney's fees arising out of the preparation for, and trial of the cause, and appeals therefrom, and other costs allowed on appeal.

(4) printing costs of trial and appellate briefs, and all other papers filed in such proceedings. [I. C., § 52-415, as added by 1976, ch. 82, § 4, p. 270.]

52-416. Immunity.—The provisions of any criminal statutes with respect to the exhibition of, or the possession with the intent to exhibit, any obscene film shall not apply to a motion picture projectionist, usher, or ticket taker acting within the scope of his employment, provided that such projectionist, usher, or ticket taker: (1) has no financial interest in the place wherein he is so employed, and (2) freely and willingly gives testimony regarding such employment in any judicial proceedings brought under this chapter, including pre-trial discovery proceedings incident thereto, when and if such is requested, and upon being granted immunity by the trial judge sitting in such matters. [I. C., § 52-416, as added by 1976, ch. 82, § 4, p. 270.]

52-417. Severability.—If any section, subsection, sentence, or clause of this act is adjudged to be unconstitutional or invalid, such adjudication shall not affect the validity of the remaining portion of this act. It is hereby declared that this act would have been passed, and each section, sentence, or clause thereof, irrespective of the fact that any one or more sections, subsections, sentences or clauses might be adjudged to be unconstitutional, or for any other reason invalid. [I. C., § 52-417, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. The words "this act" refer to S. L. 1976, ch. 82 compiled herein as §§ 52-101—52-417.

APPENDIX A

(REFERENCE: AMICUS CURIAE BRIEF AT PAGE 5.71)

Title 7, Chapter 7.48 - Nuisances- of the Revised Code of Washington annotated, as enacted by Initiative Measure No. 335 §20 approved November 8, 1977. . . . . A-13 thru A-26

CHAPTER 7.48—NUISANCES

46 Wn LR 48 (nuisance as modern mode of land use control).

48 Wn LR 904 (nuisance actions against municipal airports).

7.48.010 Actionable nuisances defined

9 Am Jur Proof of Facts, Pollution, Proof No. 1 (evidence of pollution of stream by upper riparian user).

26 Am Jur Proof of Facts, Community Noise, p 274 (heavy-duty diesel trucks operated in or near residential area), p 301 (automobile, motorcycle, and drag strip races conductd near residential area).

46 Wn LR 58 (actionable private nuisances in Washington).

77 ALR2d 1355 (airport operations or flight of aircraft as taking or damaging of property).

80 ALR2d 1124 (water sports, amusements, or exhibitions as nuisance).

82 ALR2d 413 (parking lot or place as nuisance).

83 ALR2d 848 (practice of exacting usury as nuisance or ground for injunction).

83 ALR2d 936 (nonencroaching vegetation as private nuisance).

84 ALR2d 653 (automobile wrecking yard or place of business as nuisance).

86 ALR2d 1322 (oil refinery as nuisance).

91 ALR2d 572 (drive-in restaurant or cafe as nuisance).

93 ALR2d 1171 (drive-in theater or other outdoor dramatic or musical entertainment as nuisance).

2 ALR3d 931 (keeping pigs as nuisance).

2 ALR3d 965 (keeping poultry as nuisance).

2 ALR3d 1372 (motorbus or truck terminal as nuisance).

4 ALR3d 902 (electric generating plant or transformer station as nuisance).

5 ALR3d 989 (saloons or taverns as nuisance).

11 ALR3d 1399 (keeping of dogs as enjoinable nuisance).

39 ALR3d 910 (landowner's right to relief against pollution of his water supply by industrial or commercial waste).

41 ALR3d 1236 (laundry or dry cleaning establishment as nuisance).

41 ALR3d 1273 (automobile race track or drag strip as nuisance).

43 ALR3d 1009 (operation of incinerator as nuisance).

44 ALR3d 257 (estoppel of municipality as to encroachments on public streets).

49 ALR3d 545 (residential swimming pools as nuisance).

49 ALR3d 652 (public swimming pool as nuisance).

50 ALR3d 209 (gasoline or other fuel storage tanks as nuisance).

50 ALR3d 969 (exhibition of obscene motion pictures as nuisance).

58 ALR3d 1126 (zoo as nuisance).

58 ALR3d 1134 (pornoshops or similar places disseminating obscene materials as nuisance).

58 ALR3d 1142 (interference with radio or television reception as nuisance).

79 ALR3d 253 (airport operations or flight of aircraft as nuisance).

79 ALR3d 320 (existence of, and relief from, nuisance created by operation of air conditioning or ventilating equipment).

80 ALR3d 962 (fence as nuisance).

92 ALR3d 1004 (operation of cement plant as nuisance).

A. GENERAL CONSIDERATIONS

1. In General

Where governmental body is responsible for existence of nuisance per se, that is, it has created or permitted condition which is not permissible or excusable under circumstances, it is liable for injury sustained therefrom regardless of whether negligence is involved; however, if injuries result from situation which is caused by negligent commissions or omissions on part of governmental body, though it may be termed nuisance under certain circumstances, defense of governmental immunity will be sustained. Macy v Chelan (1962) 59 Wn 2d 610, 369 P2d 508.

3. Defenses

Where governmental body is responsible for existence of nuisance per se, that is, it has created or permitted condition which is not permissible or excusable under circumstances, it is liable for injury sustained therefrom regardless of whether negligence is involved; however, if injuries result from situation which is caused by negligent commissions or omissions on part of governmental body, though it may be termed nuisance under certain circumstances, defense of governmental immunity will be sustained. Macy v Chelan (1962) 59 Wn 2d 610, 369 P2d 508.

Whenever nuisance has its origin in negligence, defense of contributory negligence cannot be cut off. Albin v National Bank of Commerce (1962) 60 Wn 2d 745, 375 P2d 487.

Party is not estopped to complain of erection of chicken breeding plant near his residence because of fact that he failed to object when he had knowledge that substantial sum was being invested in plant, where complaining party was assured by owner that he would suffer no objectionable effects from such plant. Jones v Rumford (1964) 64 Wn 2d 559, 392 P2d 808.

5. Remedies

In action for damages based on unconstitutional taking it was not improper to give instruction defining nuisance in language of this statute where such instruction simply informed jury that, in determining whether there had been damage within constitutional prohibition, it could take into consideration those things defined which constitute damage. Cunningham v Tieton (1962) 60 Wn 2d 434, 374 P2d 375.

B. PARTICULAR NUISANCE

7. In General

In action for injury sustained when plaintiff dived off pier, maintained by defendant municipal corporation, and struck bottom because of shallowness of water, maintenance of pier did not constitute nuisance per se, where facility was not dangerous at all times, but only during periodic off-season lowering of water level, and only fault of defendant, if any, was negligence in failing to discover occasional danger and warn plaintiff thereof. Macy v Chelan (1962) 59 Wn 2d 610, 369 P2d 508.

Plant operated lawfully and in best manner practicable with sound operation may still constitute nuisance if such operation is unreasonable use of property; not even fee simple owner has totality of rights with respect to his real property and he must not put property to unreasonable use relative to use and enjoyment by another of his property. Jones v Rumford (1964) 64 Wn 2d 559, 392 P2d 808.

Fact that thing is unsightly or offends aesthetic sense of neighbor, does not ordinarily make it a nuisance. Mathewson v Primeau (1964) 64 Wn 2d 929, 395 P2d 183.

Party, whose property was damaged when culvert in upstream fill clogged to such extent that fill gave way and suddenly released water that had backed up behind it, failed to show that culvert and fill were nuisance created by former owner thereof when such owner had negligently rebuilt culvert, in such way that it required constant maintenance, and then conveyed culvert and fill to individuals who could not reasonably be expected to maintain culvert to degree that it would keep it adequate, where, even assuming culvert to be negligently constructed, there was no invasion of downstream interest while fill and culvert belonged to, and were maintained by, former owner, and evidence failed to establish that necessary maintenance of culvert was unreasonable burden on subsequent owners, or that such burden was substantially different than that related to any other culvert. Rayonier, Inc. v Chicago, M. St. P. & P. R. Co. (1966) 68 Wn 2d 103, 411 P2d 864.

7.48.020 Who may sue—Judgment for damages—Warrant for abatement—Injunction

83 ALR2d 848 (practice of exacting usury as nuisance or ground for injunction).

83 ALR2d 936 (nonencroaching vegetation as private nuisance).

11 ALR3d 1399 (keeping of dogs as enjoinable nuisance).

40 ALR3d 601 (modern status of rules as to balance of convenience or social utility as affecting relief from nuisance).

42 ALR3d 844 ("coming to a nuisance" as a defense or estoppel).

53 ALR3d 873 (nuisance: right of one compelled to discontinue business or activity constituting nuisance to indemnity from successful plaintiff).

60 ALR3d 665 (right to maintain action to enjoin public nuisance as affected by existence of pollution control agency).

2. Actions for Damages

Fact that action for damages is based on unconstitutional taking by governmental body does not exclude proof of damaging by nuisance. Cunningham v Tieton (1962) 60 Wn 2d 434, 374 P2d 375.

5. Equitable Relief

Fact that thing is unsightly or offends against aesthetic sense of neighbor, does not ordinarily afford ground for injunctive relief. Mathewson v Primeau (1964) 64 Wn 2d 929, 395 P2d 183.

Even where offense against aesthetic sense is held to be proper subject of control by legislation under police power, similar control by courts by means of injunctive relief not based on legislative action will constitute unauthorized interference with rights of property owner. Mathewson v. Primeau (1964) 64 Wn 2d 929, 395 P2d 183.

10. Judgment or Decree

An injunction should not permanently enjoin all aspects of a lawful business unless there has been a showing that it is impossible or impracticable to eliminate offensive features of the business. Chambers v. Mt. Vernon (1974) 11 Wn App 357, 522 P2d 1184.

7.48.050 Moral nuisances—Definitions

The definitions set forth in this section shall apply throughout this chapter as they relate to moral nuisances.

(1) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in the lewd manner, or knowledge of the acts of lewdness, assignation, or prostitution which occur on the premises.

(2) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which depicts or describes patently offensive representations or descriptions of:

(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

(ii) Masturbation, excretory functions, or lewd exhibition of the genitals or genital area.

Nothing herein contained is intended to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political, or scientific value.

(3) "Lewdness" shall have and include all those meanings which are assigned to it under the common law.

(4) "Matter" shall mean a motion picture film or a publication or both.

(5) "Moral nuisance" means a nuisance which is injurious to public morals.

(6) "Motion picture film" shall include any:

(a) Film or plate negative;

(b) Film or plate positive;

(c) Film designed to be projected on a screen for exhibition;

(d) Films, glass slides, or transparencies, either in negative or positive form, designed for exhibition by projection on a screen;

(e) Video tape or any other medium used to electronically reproduce images on a screen.

(7) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(8) "Place" includes, but is not limited to, any building, structure, or places, or any separate part or portion thereof, whether permanent or not, or the ground itself.

(9) "Publication" shall include any book, magazine, article, pamphlet, writing, printing, illustration, picture, sound recording, or a motion picture film which is offered for sale or exhibited in a coin-operated machine.

(10) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer of possession of, lewd matter. [Amended by Initiative Measure No. 335 § 1, approved November 8, 1977.]

Initiative 335 is unconstitutional on its face. Spokane Arcades, Inc. v Ray (1978) 449 F Supp 1145.

7.48.052 Moral nuisances

The following are declared to be moral nuisances:

(1) Any and every place in the state where lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition;

(2) Any and every place in the state where a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition;

(3) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a moral nuisance under this section;

(4) Any and every place of business in the state in which lewd publications constitute a principal part of the stock in trade;

(5) Any and every lewd publication possessed at a place which is a moral nuisance under this section;

(6) Every place which, as a regular course of business, is used for the purpose of lewdness, assignation, or prostitution, and every such place in or upon which acts of lewdness, assignation, or prostitution are conducted, permitted, carried on, continued, or exist;

(7) All public houses or places of resort where illegal gambling is carried on or permitted; all houses or places within any city, town, or village, or upon any public road, or highway where drunkenness, illegal gambling, fighting, or breaches of the peace are carried on or permitted; all opium dens, or houses, or places of resort where opium smoking is permitted. [Added by Initiative Measure No. 335 § 2, approved November 8, 1977.]

CJS Nuisances §§ 20 et seq.
Key Number Digests: Nuisance ⇐61.

Initiative 335 is unconstitutional on its face. Spokane Arcades, Inc. v Ray (1978) 449 F Supp 1145.

7.48.054 Moral nuisance—Personal property—Effects of notice

The following are also declared to be moral nuisances, as personal property used in conducting and maintaining a moral nuisance:

(1) All moneys paid as admission price to the exhibition of any lewd film found to be a moral nuisance;

(2) All valuable consideration received for the sale of any lewd publication which is found to be a moral nuisance;

(3) The furniture, fixtures, and contents of a place which is a moral nuisance.

From and after service of a copy of the notice of hearing of the application for a preliminary injunction, provided for in RCW 7.48.064, upon the place or its manager, acting manager, or person then in charge, all such persons are deemed to have knowledge of the acts, conditions, or things which make such place a moral nuisance. Where the circumstantial proof warrants a determination that a person had knowledge of the moral nuisance prior to such service of process, the court shall make such finding. [Added by Initiative Measure No. 335 § 3, approved November 8, 1977.]

CJS Nuisances §§ 20 et seq.
Key Number Digests: Nuisance ⇐61.

7.48.056 Abate moral nuisance—Enjoin owner

In addition to any other remedy provided by law, any act, occupation, structure, or thing which is a moral nuisance may be abated, and the person doing such act or engaged in such occupation, and the owner and agent of the owner of any such structure or thing, may be enjoined as provided in this chapter. [Added by Initiative Measure No. 335 § 4, approved November 8, 1977.]

CJS Nuisances §§ 102, 109, 130.
Key Number Digests: Nuisance ⇐77.

7.48.058 Maintaining action to abate moral nuisance—Bond

The attorney general, prosecuting attorney, city attorney, city prosecutor, or any citizen of the county may maintain an action of an equitable nature in the name of the state of Washington upon the relation of such attorney general, prosecuting attorney, city attorney, city prosecutor, or citizen, to abate a moral nuisance, to perpetually enjoin all persons from maintaining the same, and to enjoin the use of any structure or thing adjudged to be a moral nuisance.

If such action is instituted by a private person, the complainant shall execute a bond to the person against whom complaint is made, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of

not less than five hundred dollars, to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, and the court finds there was no reasonable grounds or cause for said action and the case is dismissed for that reason before trial or for want of prosecution. No bond shall be required of the attorney general, prosecuting attorney, city attorney, or city prosecutor, and no action shall be maintained against such public official for his official action when brought in good faith. [Added by Initiative Measure No. 335 § 5, approved November 8, 1977.]

CJS Nuisances §§ 76 et seq., 121 et seq.
Key Number Digests: Nuisance ⇐82, 84.

7.48.060 Moral nuisance—Jurisdiction—Filing a complaint

The action provided for in RCW 7.48.058 shall be brought in any court of competent jurisdiction in the county in which the property is located. Such action shall be commenced by the filing of a verified complaint alleging the facts constituting the nuisance. After the filing of said complaint, application for a temporary injunction may be made to the court in which the action is filed, or to a judge thereof, who shall grant a hearing within ten days after the filing. [Amended by Initiative Measure No. 335 § 6, approved November 8, 1977.]

Initiative 335 is unconstitutional on its face. Spokane Arcades, Inc. v Ray (1978) 449 F Supp 1145.

7.48.062 Moral nuisance—Restraining order—Violations

Where such application for a temporary injunction is made, the court or judge thereof may, on application of the complainant showing good cause, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon, except that pending such decision, the stock in trade may not be so restrained, but an inventory and full accounting of all business transactions may be required.

The restraining order may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by both such delivery and posting. The officer serving such restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance.

Any violation of such restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof while the same remains in force is a contempt of court if such posted order contains therein a notice to that effect. [Added by Initiative Measure No. 335 § 7, approved November 8, 1977.]

CJS Nuisances §§ 102, 109, 130.
Key Number Digests: Nuisance ⇐77.

7.48.064 Moral nuisance—Hearing—Notice—Consolidation with trial

A copy of the complaint, together with a notice of the time and place of the hearing of the application for a temporary injunction, shall be served upon the defendant at least three days before such hearing. The place may

also be served by posting such papers in the same manner as is provided for in RCW 7.48.062 in the case of a restraining order. If the hearing is then continued at the instance of any defendant, the temporary writ as prayed shall be granted as a matter of course.

Before or after the commencement of the hearing of an application for a temporary injunction, the court, on application of either of the parties or on its own motion, may order the trial of the action on the merits to be advanced and consolidated with the hearing on the application for the temporary injunction. Any evidence received upon an application for a temporary injunction which would be admissible in the trial on the merits becomes a part of the record of the trial and need not be repeated as to such parties at the trial on the merits. [Added by Initiative Measure No. 335 § 8, approved November 8, 1977.]

CJS Nuisances §§ 121 et seq.
Key Number Digests: Nuisance ⇐84.

7.48.066 Finding of moral nuisance—Orders

If upon hearing, the allegations of the complaint are sustained to the satisfaction of the court or judge, the court or judge shall issue a temporary injunction without additional bond, restraining the defendant and any other person from continuing the nuisance.

If at the time the temporary injunction is granted, it further appears that the person owning, in control of, or in charge of the nuisance so enjoined had received three days notice of the hearing, then the court shall declare a temporary forfeiture of the use of the real property upon which such public nuisance is located and the personal property located therein, and shall forthwith issue an order closing such place against its use for any purpose until a final decision is rendered on the application for a permanent injunction, unless:

(1) The person owning, in control of, or in charge of such nuisance shows to the satisfaction of the court or judge, by competent and admissible evidence which is subject to cross-examination, that the nuisance complained of has been abated by such person; or

(2) The owner of such property, as a "good faith" lessor, has taken action to void said lease as is authorized by RCW 7.48.085.

Such order shall also continue in effect for such further period as the order authorized in RCW 7.48.062 provides. If no order has been issued pursuant to RCW 7.48.062, then an order restraining the removal or interference with the personal property and contents located therein shall be issued. Such restraining order shall be served and the inventory of such property shall be made and filed as provided for in RCW 7.48.062.

Such order shall also require such persons to show cause within thirty days why such closing order should not be made permanent, as provided for in RCW 7.48.078. [Added by Initiative Measure No. 335 § 9, approved November 8, 1977.]

CJS Nuisances §§ 121 et seq.
Key Number Digests: Nuisance ⇐84.

7.48.068 Abatement of moral nuisance by owner—Effect on injunction

The owner of any real or personal property to be closed or restrained, or which has been closed or restrained, may appear after the filing of the complaint and before the hearing on the application for a permanent injunction.

The court, if satisfied of the good faith of the owner of the real property and of the innocence on the part of any owner of the personal property of any knowledge of its use as a nuisance, and that with reasonable care and diligence such owner could not have known thereof shall, at the time of the hearing on the application for the temporary injunction and upon payment of all costs incurred and upon the filing of a bond by the owner of the real property with sureties to be approved by the clerk in the full value of the property to be ascertained by the court, conditioned that such owner will immediately abate the nuisance and prevent the same from being established or kept, refrain from issuing any order closing such real property or restraining the removal or interference with such personal property, and, if such temporary injunction has already been issued, shall cancel said order and shall deliver such real or personal property, or both, to the respective owners thereof. The release of any real or personal property under this section shall not release it from any judgment, lien, penalty, or liability to which it may be subjected by law. [Added by Initiative Measure No. 335 § 10, approved November 8, 1977.]

Voluntary abatement: RCWA 7.48.110.

CJS Nuisances §§ 102, 109, 130.
Key Number Digests: Nuisance ⇐77.

7.48.070 Moral nuisance—Priority of action on calendar

The action provided for in RCW 7.48.058 shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions. [Amended by Initiative Measure No. 335 § 11, approved November 8, 1977.]

CJS Trial § 33.
Key Number Digests: Trial ⇐13.1(2).

7.48.072 Moral nuisance—Effects of admission or finding of guilt

In such action, an admission or finding of guilty of any person under the criminal laws against lewdness, prostitution, or assignation at any such place is admissible for the purpose of proving the existence of such nuisance, and is prima face evidence of such nuisance and of knowledge of, and of acquiescence and participation therein, on the part of the person charged with maintaining such nuisance. [Added by Initiative Measure No. 335 § 12, approved November 8, 1977.]

7.48.074 Moral nuisance—Evidence of reputation—Admissibility

At all hearings upon the merits, evidence of the general reputation of the building or place constituting the alleged nuisance, of the inmates thereof, and of those resorting thereto, is admissible for the purpose of proving the existence of such nuisance. [Added by Initiative Measure No. 335 § 13, approved November 8, 1977.]

CJS Nuisances §§ 121 et seq.
Key Number Digests: Nuisance ⇐84.

7.48.076 Moral nuisance—Trial—Costs—Dismissal—Judgment

If the action is brought by a person who is a citizen of the county, and the court finds that there were no reasonable grounds or probable cause for bringing said action, and the case is dismissed before trial for that reason or for want of prosecution, the costs, including attorney's fees, may be taxed to such person.

If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of, and the defendant from maintaining such nuisance elsewhere. The entire expenses of such abatement, including attorney's fees, shall be recoverable by the plaintiff as a part of his costs of the lawsuit.

If the complaint is filed by a person who is a citizen of the county, it shall not be dismissed except upon a sworn statement by the complainant and his attorney, setting forth the reason why the action should be dismissed and the dismissal approved by the prosecuting attorney in writing or in open court. If the judge is of the opinion that the action should not be dismissed, he may direct the prosecuting attorney to prosecute said action to judgment at the expense of the county, and if the action is continued for more than one term of court, any person who is a citizen of the county or has an office therein, or the attorney general, the prosecuting attorney, city attorney, or city prosecutor, may be substituted for the complainant and prosecute said action to judgment. [Added by Initiative Measure No. 335 § 14, approved November 8, 1977.]

7.48.078 Moral nuisance—Judgment—Penalties—Disposal personal property

If the existence of a nuisance is admitted or established in an action as provided for in RCW 7.48.058 or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance and not already released under authority of the court as provided for in RCW 7.48.066 and 7.48.068, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Lewd matter shall be destroyed and shall not be sold.

Such judgment shall impose a penalty of three hundred dollars for the maintenance of such nuisance, which penalty shall be imposed against the person or persons found to have maintained the nuisance, and, in case any owner or agent of the building found to have had actual or constructive notice of the maintenance of such nuisance, against such owner or agent, and against the building kept or used for the purposes of maintaining a moral nuisance, which penalty shall be collected by execution as in civil actions, and when collected, shall be paid into the current expense fund of the county in which the judgment is had.

Such order shall also require the renewal for one year of any bond furnished by the owner of the real property, as provided in RCW 7.48.068 or, if not so furnished, shall continue for one year any closing order issued at the time of granting the temporary injunction, or, if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose and keeping it closed for a period of one year unless sooner released.

The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in RCW 7.48.068.

Owners of unsold personal property and contents so seized must appear and claim the same within ten days after such order of abatement is made, and prove innocence to the satisfaction of the court of any knowledge of such use thereof, and that with reasonable care and diligence they could not have known thereof. If such innocence is established, such unsold personal proper-

ty and contents shall be delivered to the owner, otherwise it shall be sold as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; and for closing the place and keeping it closed, a reasonable sum shall be allowed by the court. [Added by Initiative Measure No. 335 § 15, approved November 8, 1977.]

CJS Nuisances §§ 121 et seq.
Key Number Digests: Nuisance ⇐84, 85.

7.48.080 Moral nuisance—Contempt for violation of injunction

In case of the violation of any injunction granted under the provisions of RCW 7.48.050 through 7.48.100 as now or hereafter amended, the court or judge may summarily try and punish the offender. The proceedings shall be commenced by filing with the clerk of the court an information under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause an attachment to issue, under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than three nor more than six months, or by both fine and imprisonment. [Amended by Initiative Measure No. 335 § 16, approved November 8, 1977.]

CJS Nuisances § 135.
Key Number Digests: Nuisance ⇐86.

7.48.085 Moral nuisance—Property owner may repossess

If a tenant or occupant of a building or tenement, under a lawful title, uses such place for the purposes of maintaining a moral nuisance, such use makes void at the option of the owner the lease or other title under which he holds, and without any act of the owner causes the right of possession to revert and vest in such owner, who may without process of law make immediate entry upon the premises. [Added by Initiative Measure No. 335 § 17, approved November 8, 1977.]

CJS Landlord and Tenant §§ 326 et seq., 716 et seq.
Key Number Digests: Landlord and Tenant ⇐134(3), 275.

7.48.090 Moral nuisance—Contraband—Forfeitures

Lewd matter is contraband, and there are no property rights therein. All personal property declared to be a moral nuisance in RCW 7.48.052 and 7.48.054 and all moneys and other consideration declared to be a moral nuisance under RCW 7.48.056 are the subject of forfeiture to the local government and are recoverable as damages in the county wherein such matter is sold, exhibited, or otherwise used. Such moneys may be traced to and shall be recoverable from persons who, under RCW 7.48.064, have knowledge of the nuisance at the time such moneys are received by them.

Upon judgment against the defendants in legal proceedings brought pursuant to RCW 7.48.050 through 7.48.100 as now or hereafter amended, an accounting shall be made by such defendant or defendants of all moneys received by them which have been declared to be a public nuisance under this section. An amount equal to the sum of all moneys estimated to have been taken in as gross income from such unlawful commercial activity shall be forfeited to the general funds of the city and county governments wherein

such matter is sold or exhibited, to be shared equally, as a forfeiture of the fruits of an unlawful enterprise and as partial restitution for damages done to the public welfare, public health, and public morals.

Where the action is brought pursuant to RCW 7.48.050 through 7.48.100 as now or hereafter amended, special injury need not be proven, and the costs of abatement are a lien on both the real and personal property used in maintaining the nuisance. Costs of abatement include, but are not limited to the following:

(1) Investigative costs;

(2) Court costs;

(3) Reasonable attorney's fees arising out of the prepartion for and trial of the cause, appeals therefrom, and other costs allowed on appeal;

(4) Printing costs of trial and appellate briefs, and all other papers filed in such proceedings. [Amended by Initiative Measure No. 335 § 18, approved November 8, 1977.]

7.48.100 Moral nuisance—Immunity or certain motion picture theatre employees

The provisions of any criminal statutes with respect to the exhibition of, or the possession with the intent to exhibit, any obscene film shall not apply to a motion picture projectionist, usher, or ticket taker acting within the scope of his employment, if such projectionist, usher, or ticket taker (1) has no financial interest in the place wherein he is so employed, other than his salary, and (2) freely and willingly gives testimony regarding such employment in any judicial proceedings brought under RCW 7.48.050 through 7.48.100 as now or hereafter amended, including pretrial discovery proceedings incident thereto, when and if such is requested, and upon being granted immunity by the trial judge sitting in such matters. [Amended by Initiative Measure No. 335 § 19, approved November 8, 1977.]

7.48.120 Nuisance defined

77 ALR2d 1355 (airport operations or flight of aircraft as taking or damaging of property).
82 ALR2d 413 (parking lot or place as nuisance).
83 ALR2d 848 (practice of exacting usury as nuisance or ground for injunction).
83 ALR2d 936 (nonencroaching vegetation as private nuisance).
84 ALR2d 653 (automobile wrecking yard or place of business as nuisance).
86 ALR2d 1322 (oil refinery as nuisance).
91 ALR2d 572 (drive-in restaurant or cafe as nuisance).
92 ALR2d 974 (dairy, creamery, or milk distributing plant, as nuisance).
93 ALR2d 1171 (drive-in theater or other outdoor dramatic or musical entertainment as nuisance).
2 ALR3d 931 (keeping pigs as nuisance).
2 ALR3d 965 (keeping poultry as nuisance).
2 ALR3d 1372 (motorbus or truck terminal as nuisance).
4 ALR3d 902 (electric generating plant or transformer station as nuisance).
5 ALR3d 989 (saloons or taverns as nuisance).
11 ALR3d 1399 (keeping of dogs as enjoinable nuisance).
32 ALR3d 1127 (children's playground as nuisance).
55 ALR3d 1134 (pornoshops or similar places disseminating obscene materials as nuisance).
58 ALR3d 1126 (zoo as nuisance).
58 ALR3d 1142 (interference with radio or television reception as nuisance).
79 ALR3d 253 (airport operations or flight or aircraft as nuisance).

79 ALR3d 320 (existence of, and relief from, nuisance created by operation of air conditioning or ventilating equipment).

80 ALR3d 962 (fence as nuisance).

82 ALR3d 1004 (operation of cement plant as nuisance).

1. In General

In action for injury sustained when plaintiff dived off pier, maintained by defendant municipal corporation, and struck bottom because of shallowness of water, maintenance of pier did not constitute nuisance per se, where facility was not dangerous at all times, but only during periodic off-season lowering of water level, and only fault of defendant, if any, was negligence in failing to discover occasional danger and warn plaintiff thereof. Macy v Chelan (1962) 59 Wn 2d 610, 369 P2d 508.

Instructions.—After having given instructions on plaintiff's theory of negligence, court properly refused to give proposed instruction on nuisance which was based on same omission to perform duty which allegedly constituted negligence, and which was requested for purpose of depriving defendant of defense of contributory negligence. Albin v National Bank of Commerce (1962) 60 Wn 2d 745, 375 P2d 487.

Plant operated lawfully and in best manner practicable with sound operation may still constitute nuisance if such operation is unreasonable use of property; not even fee simple owner has totality of rights with respect to his real property and he must not put property to unreasonable use relative to use and enjoyment by another of his property. Jones v Rumford (1964) 64 Wn 2d 559, 392 P2d 808.

Party, whose property was damaged when culvert in upstream fill clogged to such extent that fill gave way and suddenly released water that had backed up behind it, failed to show that culvert and fill were nuisance created by former owner thereof when such owner had negligently rebuilt culvert, in such way that it required constant maintenance, and then conveyed culvert and fill to individuals who could not reasonably be expected to maintain culvert to degree that it would keep it adequate, where, even assuming culvert to be negligently constructed, there was no invasion of downstream interest while fill and culvert belonged to, and were maintained by, former owner, and evidence failed to establish that necessary maintenance of culvert was unreasonable burden on subsequent owners, or that such burden was substantially different than that related to any other culvert. Rayonier, Inc. v Chicago, M. St. P. & P. R. Co. (1966) 68 Wn 2d 103, 411 P2d 864.

2. Obstruction of Public Ways

Abutting property owners could not be said to have created nuisance or violated their duty to use property so as not to render adjacent highways unsafe for ordinary travel, simply because surface waters they caused to drain onto highway had collected in large pool and obstructed ordinary travel, where cause of collection of water was inadequate drainage in highway and highway was under exclusive control of county. Kelly v Gifford (1963) 63 Wn 2d 221, 386 P2d 415.

7.48.130 Public nuisance defined

82 ALR2d 413 (parking lot or place as nuisance).
83 ALR2d 848 (practice of exacting usury as nuisance or ground for injunction).
91 ALR2d 572 (drive-in restaurant or cafe as nuisance).

7.48.140 Public nuisances enumerated

82 ALR2d 413 (parking lot or place as nuisance).
91 ALR2d 572 (drive-in restaurant or cafe as nuisance).

The legitimacy of an electical transmission line installation is not germane to any question as to its being or not being a public nuisance inasmuch as such lines generally are not classified as public nuisances despite their encroachment upon public or private property. Frisch v Public Utility Dist. of Snohomish County (1973) 8 Wn App 555, 507 P2d 1201.

7.48.150 Private nuisance defined

46 Wn LR 54 (nuisance as land use control—private nuisance).
82 ALR2d 413 (parking lot or place as nuisance).
83 ALR2d 936 (nonencroaching vegetation as private nuisance).
91 ALR2d 572 (drive-in restaurant or cafe as nuisance).
93 ALR2d 1171 (drive-in theater or other outdoor dramatic or musical entertainment as nuisance).

7.48.160 Authorized act not a nuisance

Highway built pursuant to specific statute and under general statutory authority of highway statutes, cannot constitute nuisance in fact simply because of its proximity to certain building, since nothing which is done or maintained under express authority of statute can be deemed nuisance. Deaconess Hospital v Washington State Highway Com. (1965) 66 Wn 2d 378, 403 P2d 54.

7.48.200 Remedies

83 ALR2d 848 (practice of exacting usury as nuisance or ground for injunction).

7.48.210 Civil action, who may maintain

35 Wn LR 362 (standing requirements for obtaining review of governmental action in Washington).
60 ALR3d 665 (right to maintain action to enjoin public nuisance as affected by existence of pollution control agency).

4. Acts in Violation of Law

Injunctive relief is available against violations of zoning ordinances which are declared by ordinance to be nuisances. Mercer Island v Steinmann (1973) 9 Wn App 479, 513 P2d 80.

7.48.230 Public nuisance—Abatement

60 ALR3d 665 (right to maintain action to enjoin public nuisance as affected by existence of pollution control agency).

Finding that defendant "in employing the bulldozer to improve his access, had no reasonable necessity to remove the hedge which plaintiffs had maintained upon the twelve foot strip and upon the railroad right of way; said defendant could have stayed to the west of plaintiffs' and no useful purpose was served by removing the said hedge and the bulkhead," brought defendants within this statute's prohibition against committing unnecessary injury, in action for damages from wilful trespass. Nystrand v O'Malley (1962) 60 Wn 2d 792, 375 P2d 863.

7.48.240 Certain places of resort declared nuisances

Houses of ill fame, kept for the purpose, where persons are employed for purposes of prostitution; all public houses or places of resort where gambling is carried on, or permitted; all houses or places within any city, town, or village, or upon any public road, or highway where drunkenness, gambling, fighting or breaches of the peace are carried on, or permitted; all opium dens, or houses, or places of resort where opium smoking is permitted, are nuisances, and may be abated, and the owners, keepers, or persons in charge thereof, and persons carrying on such unlawful business shall be punished as provided in this chapter. [Amended by Laws 1st Ex Sess 1973 ch 154 § 18.]

Severability—1973 1st ex.s. c 154: See note following RCW 2.12.030.

7.48.250 Penalty—Abatement

1 Am Jur Pl and Pr Forms (Rev ed), Abatement, Form 51 (order sustaining plea in abatement).

7.48.900 Severability—Initiative Measure No. 335

If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected. [Enacted by Initiative Measure No. 335 § 20, approved November 8, 1977.]

APPENDIX A

(REFERENCE: AMICUS CURIAE BRIEF AT PAGE 5.71)

Chapter 19, Article 1 - Abatement of nuisances - of the North Carolina General Statutes, as added by Session Laws 1977, C 819, effective August 1, 1977 . . . . . A-27 thru A-34

Chapter 19.

Offenses against Public Morals.

Article 1.

Abatement of Nuisances.

Sec.
19-1. What are nuisances under this Chapter.
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19-1.2. Types of nuisances.
19-1.3. Personal property as a nuisance; knowledge of nuisance.
19-1.4. Liability of successive owners for continuing nuisance.
19-1.5. Abatement does not preclude action.
19-2. [Repealed.]
19-2.1. Action for abatement; injunction.
19-2.2. Pleadings; jurisdiction; venue; application for preliminary injunction.
19-2.3. Temporary order restraining removal of personal property from premises; service; punishment.
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19-2.5. Hearing on the preliminary injunction; issuance.
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Article 2.

Civil Remedy for Sales of Harmful Materials to Minors.

19-9. Title.
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19-20. Contempt; defenses; extradition.
19-21. [Repealed.]

ARTICLE 1.

Abatement of Nuisances.

§ 19-1. What are nuisances under this Chapter. — (a) The erection, establishment, continuance, maintenance, use, ownership or leasing of any building or place for the purpose of assignation, prostitution, gambling, illegal possession or sale of intoxicating liquors, illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or illegal possession or sale of obscene or lewd matter, as defined in this Chapter, shall constitute a nuisance.

(b) The erection, establishment, continuance, maintenance, use, ownership or leasing of any building or place wherein or whereon are carried on, conducted, or permitted repeated acts which create and constitute a breach of the peace shall constitute a nuisance.

(c) The building, or place, or vehicle, or the ground itself, in or upon which a nuisance as defined in subsections (a) or (b) above is carried on, and the furniture, fixtures, and contents, are also declared a nuisance, and shall be enjoined and abated as hereinafter provided. (Pub. Loc. 1913, c. 761, s. 25; 1919, c. 288; C. S., s. 3180; 1949, c. 1164; 1967, c. 142; 1971, c. 655; 1977, c. 819, ss. 1, 2.)

Cross References. — As to criminal actions: For prostitution, see § 14-203 et seq.; for gambling, see § 14-289 et seq.; for unlawful sale of whiskey, see § 18A-56.

Editor's Note. — The 1977 amendment deleted "or" preceding "illegal possession or sale" and substituted "North Carolina Control Substances Act, or illegal possession or sale of obscene or lewd matter, as defined in this Chapter" for "Uniform Narcotic Drug Act" in

§ 19-1.1. Definitions. — As used in this Chapter relating to illegal possession or sale of obscene matter or to the other conduct prohibited in G.S. 19-1(a), the following definitions shall apply:

(1) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in the lewd matter, or knowledge of the acts of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or prostitution which occur on the premises.

(2) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which depicts patently offensive representations of:

1. Ultimate sexual acts, normal or perverted, actual or simulated;
2. Masturbation, excretory functions, or lewd exhibition of the genitals or genital area;
3. Masochism or sadism; or
4. Sexual acts with a child or animal.

Nothing herein contained is intended to include or proscribe any writing or written material, nor to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political, educational, or scientific value.

(3) "Lewdness" is synonymous with obscenity and shall mean the act of selling, exhibiting or possessing for sale or exhibition lewd matter.

(4) "Matter" means a motion picture film or a publication or both.

(5) "Motion picture film" shall include any:

(a) Film or plate negative;

(b) Film or plate positive;

(c) Film designed to be projected on a screen for exhibition;

(d) Films, glass slides or transparencies, either in negative or positive form, designed for exhibition by projection on a screen;

(e) Video tape or any other medium used to electronically reproduce images on a screen.

(6) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(7) "Place" includes, but is not limited to, any building, structure or places, or any separate part or portion thereof, whether permanent or not, or the ground itself, but excluding a private dwelling place not used for a profit.

(8) "Publication" shall include any book, magazine, pamphlet, illustration, photograph, picture, sound recording, or a motion picture film which is offered for sale or exhibited in a coin-operated machine.

(9) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer or possession of, lewd matter. (1977, c. 819, s. 3.)

§ 19-1.2. Types of nuisances. — The following are declared to be nuisances wherein obscene or lewd matter or other conduct prohibited in G.S. 19-1(a) is involved:

(1) Any and every place in the State where lewd films are publicly exhibited as a predominant and regular course of business, or possessed for the purpose of such exhibition;

(2) Any and every place in the State where a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition;

(3) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a nuisance under this Article;

(4) Any and every place of business in the State in which lewd publications constitute a principal or substantial part of the stock in trade;

(5) Any and every lewd publication possessed at a place which is a nuisance under this Article;

(6) Every place which, as a regular course of business, is used for the purposes of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or prostitution, and every such place in or upon which acts of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or prostitution, are held or occur. (1977, c. 819, s. 3.)

§ 19-1.3. Personal property as a nuisance; knowledge of nuisance. — The following are also declared to be nuisances, as personal property used in conducting and maintaining a nuisance under this Chapter:

(1) All moneys paid as admission price to the exhibition of any lewd film found to be a nuisance;

(2) All valuable consideration received for the sale of any lewd publication which is found to be a nuisance;

(3) All money or other valuable consideration received or used in gambling, prostitution, the illegal sale of intoxicating liquors or the illegal sale of substances prescribed under the North Carolina Controlled Substances Act, as well as the furniture and movable contents of a place used in connection with such prohibited conduct.

From and after service of a copy of the notice of hearing of the application for a preliminary injunction, provided for in G.S. 19-2.4 upon the place, or its manager, or acting manager, or person then in charge, all such parties are deemed to have knowledge of the contents of the restraining order and the use of the place occurring thereafter. Where the circumstantial proof warrants a determination that a person had knowledge of the nuisance prior to such service of process, the court may make such finding. (1977, c. 819, s. 3.)

§ 19-1.4. Liability of successive owners for continuing nuisance. — After notice of a temporary restraining order, preliminary injunction, or permanent injunction, every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property, created by a former owner, is liable therefor in the same manner as the one who first created it. (1977, c. 819, s. 3.)

§ 19-1.5. Abatement does not preclude action. — The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence. (1977, c. 819, s. 3.)

§ 19-2: Repealed by Session Laws 1977, c. 819, s. 4, effective August 1, 1977.

Cross Reference. — For present provisions covering the subject matter of the repealed section, see §§ 19-2.1 to 19-2.5.

§ 19-2.1. Action for abatement; injunction. — Wherever a nuisance is kept, maintained, or exists, as defined in this Article, the Attorney General, district attorney, or any private citizen of the county may maintain a civil action in the

name of the State of North Carolina to abate a nuisance under this Chapter, perpetually to enjoin all persons from maintaining the same, and to enjoin the use of any structure or thing adjudged to be a nuisance under this Chapter; provided, however, that no private citizen may maintain such action where the alleged nuisance involves the illegal possession or sale of obscene or lewd matter.

If an action is instituted by a private person, the complainant shall execute a bond prior to the issuance of a restraining order or a temporary injunction, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than one thousand dollars ($1,000), to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not maintained, or if it is finally decided that the temporary restraining order or preliminary injunction ought not to have been granted. The party enjoined shall have recourse against said bond for all damages suffered, including damages to his property, person, or character and including reasonable attorney's fees incurred by him in making defense to said action. No bond shall be required of the prosecuting attorney or the Attorney General, and no action shall be maintained against the public official for his official action. (1977, c. 819, s. 4.)

Editor's Note. — The annotations set out below are from cases decided under former § 19-2.

An action to abate a public nuisance by injunction or otherwise must be maintained in the name of the State, and this section designates with particularity those who may become relators and prosecute the cause in the name of the State. Dare County v. Mater, 235 N.C. 179, 69 S.E.2d 244 (1952).

While the members of a county board of commissioners may, as individuals, become relators under this section, they may not prosecute this action in the name of the county. Dare County v. Mater, 235 N.C. 179, 69 S.E.2d 244 (1952).

Procedure Cannot Be Invoked against Alcoholic Control Board. — It was never intended that the procedure here invoked to abate a nuisance should be applied against the alcoholic control board set up under color of legislative authority, or against one who rents a building to such a board for the purpose of operating a liquor control store. State ex rel. Amick v. Lancaster, 228 N.C. 157, 44 S.E.2d 733 (1947).

The proceeding by a citizen in the name of the State for injunction, the closing of a place of business and the seizure and sale of the personal property used therewith, must be based upon allegation and proof of one or more of the specific acts denounced by § 19-1. State ex rel. Dickey v. Alverson, 225 N.C. 29, 33 S.E.2d 135 (1945).

Allegation of Direct Injury to Citizen Bringing Action Not Required. — While ordinarily a resident and citizen may not enjoin public officials from putting into effect the provisions of a legislative enactment on the ground that the act is unconstitutional unless he alleges and proves that he will suffer direct injury, such allegation is not necessary in an action in the name of the State under this section to enjoin the maintenance of a gambling nuisance. State ex rel. Summrell v. Carolina-Virginia Racing Ass'n, 239 N.C. 591, 80 S.E.2d 638 (1954).

Evidence Supporting Abatement. — The evidence disclosed that defendant operated a tourist camp with filling station, dining room and dance hall in front, and cabins in the rear, that the camp was on highway in a thickly settled rural community, that whiskey and contraceptives were sold, that drunken men and women were seen nightly at the place, and seen to go in the cabins in pairs and stay for a short time, that the community was constantly awakened at night by loud and boisterous conduct and profanity, that fighting occurred between drunken men and women, with many of both sexes nude or indecently clad, and that the general reputation of the place was bad, is held ample sufficient to be submitted to the jury upon the issue of whether the place constituted a nuisance against public morals as defined by § 19-1, and to support a judgment for its abatement in accordance with this section in an action brought by the solicitor as relator. Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938).

Lease Is Made in Contemplation of Section. — A lease contract will be held to have been made in contemplation of the statute in effect at the time of the execution of the lease, providing for the abatement of nuisance against public morals, and the lessor is subject to the rights of the State to padlock the premises in accordance with the statute if they are used in operating a nuisance as defined by the act. Barker v. Palmer, 217 N.C. 519, 8 S.E.2d 610 (1940).

§ 19-2.2. Pleadings; jurisdiction; venue; application for preliminary injunction. — The action, provided for in this Chapter, shall be brought in the superior court of the county in which the property is located. Such action shall be commenced by the filing of a verified complaint alleging the facts constituting the nuisance. After the filing of said complaint, application for a preliminary injunction may be made to the court in which the action is filed which court shall grant a hearing within 10 days after the filing of said application. (1977, c. 819, s. 4.)

§ 19-2.3. Temporary order restraining removal of personal property from premises; service; punishment. — Where such application for a preliminary injunction is made, the court may, on application of the complainant showing good cause, issue an ex parte temporary restraining order in accordance with G.S. 1A-1, Rule 65(b), preserving the status quo and restraining the defendant and all other persons from removing or in any manner interfering with any evidence specifically described, or in any manner removing or interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court granting or refusing such preliminary injunction and until further order of the court thereon. Nothing herein shall be interpreted to allow the prior restraint of the distribution of any matter or the sale of the stock in trade, but an inventory and full accounting of all business transactions involving alleged obscene or lewd matter thereafter shall be required.

Any person, firm, or corporation enjoined pursuant to this section may file with the court a motion to dissolve any temporary restraining order. Such a motion shall be heard within 24 hours of the time a copy of the motion is served on the complaining party, or on the next day the superior courts are open in the district, whichever is later. At such hearing the complaining party shall have the burden of showing why the restraining order should be continued.

In the event a temporary restraining order is issued, it may be served in accordance with the provisions of G.S. 1A-1, Rule 4, or may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by such service under said Rule 4, delivery and posting. The officer serving such temporary restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance.

Any violation of such temporary restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of court, provided such posted order contains therein a notice to that effect. (1977, c. 819, s. 4.)

§ 19-2.4. Notice of hearing on preliminary injunction; consolidation. — A copy of the complaint, together with a notice of the time and place of the hearing of the application for a preliminary injunction, shall be served upon the defendant at least five days before such hearing. The place may also be served by posting such papers in the same manner as is provided for in G.S. 19-2.3 in the case of a temporary restraining order. If the hearing is then continued at the instance of any defendant, the temporary restraining order may be continued as a matter of course until the hearing.

Before or after the commencement of the hearing of an application for a preliminary injunction, the court, on application of either of the parties or on its own motion, may order the trial of the action on the merits to be advanced and consolidated with the hearing on the application for the preliminary injunction; provided, however, the defendant shall be entitled to a jury trial if requested. (1977, c. 819, s. 4.)

§ 19-2.5. Hearing on the preliminary injunction; issuance. — If upon hearing, the allegations of the complaint are sustained to the satisfaction of the court, the court shall issue a preliminary injunction restraining the defendant and any other person from continuing the nuisance and effectually enjoining its use thereafter for the purpose of conducting any such nuisance. (1977, c. 819, s. 4.)

§ 19-3. Priority of action; evidence. — (a) The action provided for in this Chapter shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions.

(b) In such action, an admission or finding of guilt of any person under the criminal laws against lewdness, assignation, prostitution, gambling, the illegal possession or sale of intoxicating liquors, or the illegal possession or sale of substances proscribed by the North Carolina Controlled Substances Act, at any such place, is admissible for the purpose of proving the existence of said nuisance, and is evidence of such nuisance and of knowledge of, and of acquiescence and participation therein, on the part of the person charged with maintaining said nuisance.

(c) At all hearings upon the merits, evidence of the general reputation of the building or place constituting the alleged nuisance, of the inmates thereof, and of those resorting thereto, is admissible for the purpose of proving the existence of such nuisance. (Pub. Loc. 1913, c. 761, s. 27; 1919, c. 288; C. S., s. 3182; 1971, c. 528, s. 6; 1973, c. 47, s. 2; 1977, c. 819, s. 5.)

Cross Reference. — As to certain evidence relative to keeping disorderly houses admissible in criminal proceedings, see § 14-188.

Editor's Note. — The 1977 amendment rewrote this section.

Evidence of the general reputation of the place in question is competent in an action to abate a public nuisance. Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938).

This section, which makes evidence of the general reputation of the place admissible for the purpose of proving a nuisance, is not applicable where the defendant is not charged with maintaining a nuisance. State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (1965).

Hence, evidence of the general reputation of defendant's premises is inadmissible in prosecutions for liquor-law violations involving a charge of unlawful sale or possession of intoxicants at particular premises. State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (1965).

§ 19-4. Violation of injunction; punishment. — In case of the violation of any injunction granted under the provisions of this Chapter, the court, or, in vacation, a judge thereof, may summarily try and punish the offender. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred ($200.00) or more than one thousand dollars ($1,000), or by imprisonment in the county jail not less than three or more than six months, or by both fine and imprisonment. (Pub. Loc. 1913, c. 761, s. 28; 1919, c. 288; C. S., s. 3183.)

Cited in Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938).

§ 19-5. Content of final judgment and order. — If the existence of a nuisance is admitted or established in an action as provided for in this Chapter an order of abatement shall be entered as a part of the judgment in the case, which judgment and order shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of, and the defendant from maintaining such nuisance elsewhere within the jurisdiction of this State. Lewd matter, illegal intoxicating liquors, gambling paraphernalia, or substances proscribed under the North Carolina Controlled Substances Act shall be destroyed and not be sold.

Such order may also require the effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance.

The provisions of this Article, relating to the closing of a place with respect to obscene or lewd matter, shall not apply in any order of the court to any theatre or motion picture establishment which does not, in the regular, predominant, and ordinary course of its business, show or demonstrate lewd films or motion pictures, as defined in this Article, but any such establishment may be permanently enjoined from showing such film judicially determined to be obscene hereunder and such film or motion picture shall be destroyed and all proceeds and moneys received therefrom, after the issuance of a preliminary injunction, forfeited. (Pub. Loc. 1913, c. 761, s. 29; 1919, c. 288; C. S., s. 3184; 1977, c. 819, s. 6.)

Editor's Note. — The 1977 amendment rewrote this section.

§ 19-6. Civil penalty; forfeiture; accounting; lien as to expenses of abatement; invalidation of lease. — Lewd matter is contraband, and there are no property rights therein. All personal property, including all money and other considerations, declared to be a nuisance under the provisions of G.S. 19-1.3 and other sections of this Article, are subject to forfeiture to the local government and are recoverable as damages in the county wherein such matter is sold, exhibited or otherwise used. Such property including moneys may be traced to and shall be recoverable from persons who, under G.S. 19-2.4, have knowledge of the nuisance at the time such moneys are received by them.

Upon judgment against the defendant or defendants in legal proceedings brought pursuant to this Article, an accounting shall be made by such defendant or defendants of all moneys received by them which have been declared to be a nuisance under this Article. An amount equal to the sum of all moneys estimated to have been taken in as gross income from such unlawful commercial activity shall be forfeited to the general funds of the city and county governments wherein such activity took place, to be shared equally, as a forfeiture of the fruits of an unlawful enterprise, and as partial restitution for damages done to the public welfare; provided, however, that no provision of this Article shall authorize the recovery of any moneys or gross income received from the sale of any book, magazine, or exhibition of any motion picture prior to the issuance of a preliminary injunction. Where the action is brought pursuant to this Article, special injury need not be proven, and the costs of abatement are a lien on both the real and personal property used in maintaining the nuisance. Costs of abatement include, but are not limited to, reasonable attorney's fees and court costs.

If it is judicially found after an adversary hearing pursuant to this Article that a tenant or occupant of a building or tenement, under a lawful title, uses such place for the purposes of lewdness, assignation, prostitution, gambling, sale or possession of illegal intoxicating liquors or substances proscribed under the North Carolina Controlled Substances Act, such use makes void the lease or other title under which he holds, at the option of the owner, and, without any act of the owner, causes the right of possession to revert and vest in such owner. (Pub. Loc. 1913, c. 761, s. 30; 1919, c. 288; C. S., s. 3185; 1977, c. 819, s. 7.)

Editor's Note. — The 1977 amendment, effective Aug. 1, 1977, rewrote this section.

Local Modification. — McDowell: 1959, c. 590, s. 3.

Applied in State ex rel. Bowman v. Fipps, 266 N.C. 535, 146 S.E.2d 395 (1966).

Cited in Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938); State ex rel. Taylor v. Carolina Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954).

§ 19-7. How order of abatement may be canceled. — If the owner appears and pays all cost of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk of the superior court, conditioned that he will immediately abate said nuisance, and prevent the same from being established or kept within a period of one year thereafter, the court may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as same may relate to said property; and if the proceeding be a civil action, and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law. (Pub. Loc. 1913, c. 761, s. 31; 1919, c. 288; C. S., s. 3186.)

Stated in State ex rel. Taylor v. Carolina Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954).

Cited in Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938).

§ 19-8. Costs. — The prevailing party shall be entitled to his costs. The court shall tax as part of the costs in any action brought hereunder such fee for the attorney prosecuting or defending the action or proceedings as may in the court's discretion be reasonable remuneration for the services performed by such attorney. (Pub. Loc. 1913, c. 761, s. 32; 1919, c. 288; C. S., s. 3187; 1977, c. 819, s. 8.)

Local Modification. — McDowell: 1959, c. 590, s. 4.

Editor's Note. — The 1977 amendment added the present first sentence and inserted "or defending" in the present second sentence.

Fee Discretionary. — The allowance of a fee is a matter in the discretion of the trial judge. State ex rel. Bowman v. Fippa, 266 N.C. 535, 146 S.E.2d 395 (1966).

Cited in Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938); State v. Murphy, 235 N.C. 503, 70 S.E.2d 498 (1952).

§ 19-8.1. Immunity. — The provisions of any criminal statutes with respect to the exhibition of, or the possession with the intent to exhibit, any obscene film shall not apply to a motion picture projectionist, usher, or ticket taker acting within the scope of his employment, provided that such projectionist, usher, or ticket taker: (i) Has no financial interest in the place wherein he is so employed, and (ii) freely and willingly gives testimony regarding such employment in any judicial proceedings brought under this Chapter, including pretrial discovery proceedings incident thereto, when and if such is requested, and upon being granted immunity by the trial judge sitting in such matters. (1977, c. 819, s. 9.)

§ 19-8.2. Right of entry. — Authorized representatives of the Commission for Health Services, any local health department or the Department of Human Resources, upon presenting appropriate credentials to the owner, operator, or agent in charge of a place described in G.S. 19-1.2, are authorized to enter without delay and at any reasonable time any such place in order to inspect and investigate during the regular hours of operation of such place. (1977, c. 819, s. 9.)

§ 19-8.3. Severability. — If any section, subsection, sentence, or clause of this Article is adjudged to be unconstitutional or invalid, such adjudication shall not affect the validity of the remaining portion of this Article. It is hereby declared that this Article would have been passed, and each section, sentence, or clause thereof, irrespective of the fact that any one or more sections, subsections, sentences or clauses might be adjudged to be unconstitutional, or for any other reason invalid. (1977, c. 819, s. 10.)

APPENDIX A

(REFERENCE: AMICUS CURIAE BRIEF AT PAGE 5,7)

Chapter 7, Article 1.1 - Obscene Movie and Obscene Pictorial Publication Abatement - of the Arizona Revised Code, added by Laws 1977, Ch. 125, effective May 31, 1977

. . . . . A-35 thru A-38

CHAPTER 7.—SPECIAL ACTIONS AND PROCEEDINGS IN WHICH THE STATE IS A PARTY

ARTICLE 1.1. OBSCENE MOVIE AND OBSCENE PICTORIAL PUBLICATION ABATEMENT

Sec.
12-811. Definitions.
12-812. Nuisance.
12-813. Abatement of nuisance.
12-814. Procedure in injunction action.
12-815. Priority of action; evidence; costs.
12-816. Content by judgment and order.
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12-818. Petition by commercial operators or qualified electors for action.

ARTICLE 3. MATERNITY AND PATERNITY PROCEEDINGS

12-841. Jurisdiction.
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ARTICLE 4. CONTEMPT OF COURT

12-863.01. Punishment for persons in contempt of court for failure to provide child support.

ARTICLE 5. ESCHEAT

12-888. Concurrent authority of the department of revenue.
12-889. Escheated property; rules and regulations; salary.

ARTICLE 1. ABATEMENT OF BAWDY HOUSES

Cross References
Criminal actions involving conduct constituting criminal offenses, see § 13-102.

§ 12-810. Violation as contempt; classification

A violation or disobedience of either an injunction or order expressly provided for by this article shall be punished as a class 2 misdemeanor. As amended Laws 1978, Ch. 201, § 77, eff. Oct. 1, 1978.

For application of Laws 1978, Ch. 201, effective October 1, 1978, see note following § 1-215.
For effective date provision of Laws 1978, Ch. 201, see note following § 1-215.

Cross References
Classification of offenses, see § 13-601 et seq.
Fines, see § 13-801 et seq.
Sentences of imprisonment, see § 13-701 et seq.

ARTICLE 1.1. OBSCENE MOVIE AND OBSCENE PICTORIAL PUBLICATION ABATEMENT

Article 1.1, consisting of §§ 12-811 to 12-818, was added by Laws 1977, Ch. 125, § 9, effective May 31, 1977.

Cross References
Obscenity and indecency offenses, see § 13-531 et seq.

§ 12-811. Definitions

In this article, unless the context otherwise requires:

1. "Motion picture film" means any film or plate negative, film or plate positive, film or tape designed to be projected on a screen for exhibition, or films, glass slides or transparencies, either in negative or positive form, designed for exhibition by projection on a screen.

2. "Nuisance" means any place for the sale or exhibition of obscene motion picture films or pictorial publications.

3. "Obscene motion picture film or obscene pictorial publication" means any motion picture, film, video reproduction or pictorial publication which would constitute an obscene item as defined in § 13-3501.

4. "Person" means any individual, association, partnership, corporation, trustee, lessee, agent or assignee.

5. "Pictorial publication" means any book, magazine or pamphlet containing one or more drawings, pictures, photographs or illustrations.

6. "Place" means any building, enclosure or any separate part or portion thereof whether permanent or not or the ground itself. Added Laws 1977, Ch. 125, § 9, eff. May 31, 1977. As amended Laws 1978, Ch. 201, § 78, eff. Oct. 1, 1978.

For application of Laws 1978, Ch. 201, effective October 1, 1978, see note following § 1-215.
For effective date provision of Laws 1978, Ch. 201, see note following § 1-215.

Library References
Nuisance ⇐78.
C.J.S. Nuisance § 108.

Cross References
Nuisance,
Prevention or abatement, see Const. Art. 6, § 14.
Public, see § 13-601 et seq.

§ 12-812. Nuisance

A. Any person who maintains, establishes or conducts a nuisance, or aids or abets therein, and the agent or lessee of any interest in any such nuisance together with the persons in control of any such nuisance by any such agent or lessee can be enjoined from maintaining a nuisance pursuant to this article.

B. Upon receiving notice pursuant to § 12-814, such persons are deemed to have knowledge of the nuisance and are liable for its maintenance. Added Laws 1977, Ch. 125, § 9, eff. May 31, 1977.

Cross References
Proceeds, forfeiture upon knowledge of nuisance, after issuance of injunction, see § 12-817.

Library References
Nuisance ⇐78.
C.J.S. Nuisance § 108.

§ 12-813. Abatement of nuisance

If a nuisance exists, the attorney general, the county attorney of the county in which such nuisance exists or the city attorney of the city in which such nuisance exists may bring an action in the name of the state to abate such nuisance and to enjoin the person maintaining the nuisance from further maintenance. Added Laws 1977, Ch. 125, § 9, eff. May 31, 1977.

Cross References
Venue, see § 12-814.

Library References
Nuisance ⇐78.
C.J.S. Nuisance § 108.

§ 12-814. Procedure in injunction action

A. An action instituted pursuant to § 12-813 shall be brought in the superior court of the county in which the property is located. At the commencement of the action a verified complaint alleging the facts constituting the nuisance shall be filed in the office of the clerk of the court.

B. After the filing of the complaint, application for a preliminary injunction may be made to the court which shall grant a hearing within twenty days after the filing. Where such application for a preliminary injunction is made, the court may, on application of the complainant, issue an ex parte restraining order, restraining the defendant from removing or in any manner interfering with any obscene motion picture film or obscene pictorial publication or other item directly related to the conduct or maintenance of the place where such nuisance is alleged to exist and which is alleged in the complaint to constitute a nuisance until further order of the court. The restraining order may be served by handing to and leaving a copy of such order with the manager or person in charge of such place. Any violation of such restraining order is a contempt of court.

C. A copy of the complaint, together with a notice of the time and place of the hearing of the application for a preliminary injunction shall be served upon the defendant at least fifteen days before such hearing.

D. Before or after the commencement of the hearing of an application for a preliminary injunction, the court on application of the defendant, may order that the trial of the action on the merits be advanced and consolidated with the hearing on the application for a preliminary injunction. Evidence which would be admissible at trial shall become a part of the record and need not be reintroduced at the trial.

E. If upon hearing the allegations of the petition it appears to the court that there is sufficient evidence to establish that a nuisance as alleged in the complaint exists and that the plaintiff is likely to prevail at the trial on the merits, the court shall issue a preliminary injunction without additional bond restraining the defendant from continuing the nuisance. Such order shall also continue in effect for such further period of the restraining order if already issued, or, if not issued, it shall include an order restraining for such period the removal or interference with any obscene motion picture film or obscene pictorial publication or other item directly related to the obscene motion picture film or obscene pictorial publication including, but not limited to, promotional material for such film or publication and printing plates used to print such publication. Added Laws 1977, Ch. 125, § 9, eff. May 31, 1977.

Cross References
Notice, knowledge of nuisance and liability for maintenance, see § 12-812.
Proceeds, forfeiture upon knowledge of nuisance after issuance of injunction, see § 12-817.

Library References
Nuisance ⇐78.
C.J.S. Nuisance § 108.

§ 12-815. Priority of action; evidence; costs

A. An action instituted pursuant to this article shall have precedence over all other cases except criminal actions, election contests, injunctions, habeas corpus proceedings, temporary restraining orders and juvenile proceedings.

B. If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall enjoin the defendant from further maintaining the nuisance at the place complained of and the defendant from maintaining such nuisance elsewhere. Such judgment shall also provide that the defendant reimburse the plaintiff for the plaintiff's expenses in bringing the action, including attorney's fees and court costs. Added Laws 1977, Ch. 125, § 9, eff. May 31, 1977.

Cross References
Accounting as to proceeds upon issuance of judgment, see § 12-817.

Library References
Nuisance ⇐78.
C.J.S. Nuisance, § 108.

§ 12-816. Content of judgment and order

If the existence of a nuisance is admitted or established in an action pursuant to this article, an order of abatement shall be entered as a part of the judgment in the case. The order of abatement shall direct the removal from the place of the motion picture or pictorial publication found to be obscene and items directly related to such motion picture film or pictorial publication and shall direct the sheriff of the county in which the action was brought to seize and destroy such film, publication and other items directly related to such film or publication including, but not limited to, promotional material for such film or publication and printing plates used to print the publication. Added Laws 1977, Ch. 125, § 9, eff. May 31, 1977.

Library References
Nuisance ⇐78.
C.J.S. Nuisance § 108.

§ 12-817. Civil penalty; forfeiture; accounting

A. Obscene motion picture films and obscene pictorial publications pursuant to this article are contraband and are not subject to any property rights.

B. Any and all monies received in payment for obtaining or viewing any obscene motion picture films and obscene pictorial publications are subject to forfeiture to the county in which the abatement action is brought as restitution for damages done to the public welfare, public health and public morals. Such monies may be traced to and shall be recoverable from those persons as set forth in § 12-812 who have knowledge of the nuisance, from and after the issuance of a preliminary injunction against the conduct of such persons pursuant to § 12-814.

C. Upon the issuance of a judgment pursuant to § 12-815, subsection B, the defendants named in such judgment shall make an accounting of all monies received by them in payment for obtaining or viewing obscene motion picture films or obscene pictorial publications subject to such judgment. Added Laws 1977, Ch. 125, § 9, eff. May 31, 1977.

Library References
Nuisance ⇐78.
C.J.S. Nuisance § 108.

§ 12-818. Petition by commercial operators or qualified electors for action

If the attorney general, a county attorney or a city attorney receives a petition alleging the existence of a nuisance subject to the provisions of this article and determines that there are reasonable grounds to believe that such a nuisance exists, an action to abate such nuisance shall be brought forthwith. Such petition may be signed by only persons who operate commercial enterprises within a one-half mile radius of the location of the alleged nuisance or who are qualified electors whose voting address is within a one-half mile radius of the location of the alleged nuisance. Such petition must be signed by at least one hundred of the persons eligible to sign or fifty per cent of the persons eligible to sign, whichever is greater. Added Laws 1977, Ch. 125, § 9, eff. May 31, 1977.

Library References
Nuisance ⇐78.
C.J.S. Nuisances § 108.

APPENDIX B

(REFERENCE: AMICUS CURIAE BRIEF AT PAGE 19)

Title 9, Chapter 43, Subchapter B - Obscenity - (Articles 43.21, 43.22, 43.23 and 43.24) of Texas Penal Code, enacted by Acts 1973, 63rd Leg p. 883, Ch. 399, effective January 1, 1974 . . . . . B-1 thru B-3

§ 43.21. Definitions

In this subchapter:

(1) "Obscene" means having as a whole a dominant theme that:

(A) appeals to a prurient interest in sex, nudity, or excretion;

(B) is patently offensive because it affronts contemporary community standards relating to the description or representation of sex, nudity, or excretion; and

(C) is utterly without redeeming social value.

(2) "Material" means a book, magazine, newspaper, or other printed or written material; a picture, drawing, photograph, motion picture, or other pictorial representation; a statue or other figure; a recording, transcription, or mechanical, chemical, or electrical reproduction; or other article, equipment, or machine.

(3) "Prurient interest" means a shameful or morbid interest in nudity, sex, or excretion that goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.

(4) "Distribute" means to transfer possession, whether with or without consideration.

~~(5)~~ "Commercially distribute" means to transfer possession for valuable consideration.

§ 43.22. Obscene Display or Distribution

(a) A person commits an offense if he intentionally or knowingly displays or distributes an obscene photograph, drawing, or similar visual representation or other obscene material and is reckless about whether a person is present who will be offended or alarmed by the display or distribution.

(b) An offense under this section is a Class C misdemeanor.

§ 43.23. Commercial Obscenity

(a) A person commits an offense if, knowing the content of the material:

(1) he sells, commercially distributes, commercially exhibits, or possesses for sale, commercial distribution, or commercial exhibition any obscene material;

(2) he presents or directs an obscene play, dance, or performance or participates in that portion of the play, dance, or performance that makes it obscene; or

(3) he hires, employs, or otherwise uses a person under the age of 17 years to achieve any of the purposes set out in Subdivisions (1) and (2) of this subsection.

(b) It is an affirmative defense to prosecution under this section that the obscene material was possessed by a person having scientific, educational, governmental, or other similar justification.

(c) An offense under this section is a Class B misdemeanor unless committed under Subsection (a)(3) of this section, in which event it is a Class A misdemeanor.

§ 43.24. Sale, Distribution, or Display of Harmful Material to Minor

(a) For purposes of this section:

(1) "Minor" means an individual younger than 17 years.

(2) "Harmful material" means material whose dominant theme taken as a whole:

(A) appeals to the prurient interest of a minor, in sex, nudity, or excretion;

(B) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and

(C) is utterly without redeeming social value for minors.

(b) A person commits an offense if, knowing that the material is harmful:

(1) and knowing the person is a minor, he sells, distributes, exhibits, or possesses for sale, distribution, or exhibition to a minor harmful material;

(2) he displays harmful material and is reckless about whether a minor is present who will be offended or alarmed by the display; or

(3) he hires, employs, or uses a minor to do or accomplish or assist in doing or accomplishing any of the acts prohibited in Subsection (b)(1) or (b)(2) of this section.

(c) It is a defense to prosecution under this section that:

(1) the sale, distribution, or exhibition was by a person having scientific, educational, governmental, or other similar justification; or

(2) the sale, distribution, or exhibition was to a minor who was accompanied by a consenting parent, guardian, or spouse.

(d) An offense under this section is a Class A misdemeanor unless it is committed under Subsection (b)(3) of this section in which event it is a felony of the third degree.

APPENDIX C

(REFERENCE: AMICUS CURIAE BRIEF AT PAGE]9,22)

Chapter 18, - Search Warrants - Code of Criminal Procedure, 1965 as amended by Acts 1973, 63rd Leg. Ch. 399 Article 2 (E), effective January 1, 1974. . . . . C-1 thru C-7

"CHAPTER EIGHTEEN—SEARCH WARRANTS

Art.

18.01. Search warrant.
18.02. Grounds for issuance.
18.03. Search warrant may order arrest.
18.04. Contents of warrant.
18.05. Warrants for fire marshals and health officers.
18.06. Warrant executed without delay.
18.07. Days allowed for warrant to run.
18.08. Power of officer executing warrant.
18.09. Shall seize accused and property.
18.10. How return made.
18.11. Custody of property found.
18.12. Magistrate shall investigate.
18.13. Shall discharge defendant.
18.14. Examining trial.
18.15. Certify record to proper court.
18.16. Preventing consequences of theft.
18.17. Disposition of abandoned or unclaimed property.
18.18. Disposition of gambling paraphernalia, prohibited weapon, criminal instrument.
18.19. Disposition of certain weapons.

"Article 18.01. Search warrant

"(a) A 'search warrant' is a written order, issued by a magistrate and directed to a peace officer, commanding him to search for any property or thing and to seize the same and bring it before such magistrate.

"(b) No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested.

"Art. 18.02. Grounds for issuance

"A search warrant may be issued to search for and seize:

"(1) property acquired by theft or in any other manner which makes its acquisition a penal offense;

"(2) property specially designed, made, or adapted for or commonly used in the commission of an offense;

"(3) arms and munitions kept or prepared for the purpose of insurrection or riot;

"(4) weapons prohibited by the Penal Code;

"(5) gambling devices or equipment, altered gambling equipment, or gambling paraphernalia;

"(6) obscene materials kept or prepared for commercial distribution or exhibition, subject to the additional rules set forth by law;

"(7) drugs kept, prepared, or manufactured in violation of the laws of this state;

"(8) any property the possession of which is prohibited by law;

"(9) implements or instruments used in the commission of a crime.

"Art. 18.03. Search warrant may order arrest

"If the facts presented to the magistrate under Article 18.02 of this chapter also establish the existence of probable cause that a person has committed some offense under the laws of this state, the search warrant may, in addition, order the arrest of such person.

"Art. 18.04. Contents of warrant

"A search warrant issued under this chapter shall be sufficient if it contains the following requisites:

"(1) that it run in the name of 'The State of Texas';

"(2) that it identify, as near as may be, that which is to be seized and name or describe, as near as may be, the person, place, or thing to be searched;

"(3) that it command any peace officer of the proper county to search forthwith the person, place, or thing named; and

"(4) that it be dated and signed by the magistrate.

"Art. 18.05. Warrants for fire marshals and health officers

"(a) A search warrant may be issued to the fire marshal or health officer of the state or of any county, city, or other political subdivision for the purpose of allowing the inspection of any specified premises to determine the presence of a fire or health hazard or a violation of any fire or health regulation, statute, or ordinance.

"(b) A search warrant may not be issued under this article except upon the presentation of evidence of probable cause to believe that a fire or health hazard or violation is present in the premises sought to be inspected.

"(c) In determining probable cause, the magistrate is not limited to evidence of specific knowledge, but may consider any of the following:

"(1) the age and general condition of the premises;

"(2) previous violations or hazards found present in the premises;

"(3) the type of premises;

"(4) the purposes for which the premises are used; and

"(5) the presence of hazards or violations in and the general condition of premises near the premises sought to be inspected.

"Art. 18.06. Execution of warrants

"(a) A peace officer to whom a search warrant is delivered shall execute it without delay and forthwith return it to the proper magistrate. It must be executed within three days from the time of its issuance, and shall be executed within a shorter period if so directed in the warrant by the magistrate.

"(b) The officer shall, upon going to the place ordered to be searched or before seizing any property for which he is ordered to make the search, give notice of his purpose to the person who has charge of or is an inmate of the place or who has possession of the property described in the warrant.

"Art. 18.07. Days allowed for warrant to run

"The time allowed for the execution of a search warrant shall be three whole days, exclusive of the day of its issuance and of the day of its execution. The magistrate issuing a search warrant under the provisions of this chapter shall endorse on such search warrant the date and hour of the issuance of the same.

"Art. 18.08. Power of officer executing warrant

"In the execution of a search warrant, the officer may call to his aid any number of citizens in his county, who shall be bound to aid in the execution of the same.

"Art. 18.09. Shall seize accused and property

"When the property which the officer is directed to search for and seize is found he shall take possession of the same and carry it before the magistrate. He shall also arrest any person whom he is directed to arrest by the warrant and immediately take such person before the magistrate.

"Art. 18.10. How return made

"Upon returning the search warrant, the officer shall state on the back of the same, or on some paper attached to it, the manner in which it has been executed and shall likewise deliver to the magistrate an inventory of the property taken in his possession under the warrant.

"Art. 18.11. Custody of property found

"When a warrant has been issued to search a suspected place and there be found any property as alleged to have been there kept or concealed, the same shall be safely kept by the officer seizing the same, subject to the further order of the magistrate.

"Art. 18.12. Magistrate shall investigate

"The magistrate, upon the return of a search warrant, shall proceed to try the questions arising upon the same, and shall take testimony as in other examinations before him.

"Art. 18.13. Shall discharge defendant

"If the magistrate be not satisfied, upon investigation, that there was good ground for the issuance of the warrant, he shall discharge the defendant and order restitution of the property taken from him, except for criminal instruments. In such case, the criminal instruments shall be kept by the sheriff subject to the order of the proper court.

"Art. 18.14. Examining trial

"The magistrate shall proceed to deal with the accused as in other cases before an examining court if he is satisfied there was good ground for issuing the warrant.

"Art. 18.15. Certify record to proper court

"The magistrate shall keep a record of all the proceedings had before him in cases of search warrants, and shall certify the same and deliver them to the clerk of the court having jurisdiction of the case, before the next term of said court, and accompany the same with all the original papers relating thereto, including the certified schedule of the property seized.

"Art. 18.16. Preventing consequences of theft

"All persons have a right to prevent the consequences of theft by seizing any personal property which has been stolen and bringing it, with the supposed offender, if he can be taken, before a magistrate for examination, or delivering the same to a peace officer for that purpose. To justify such seizure, there must, however, be reasonable ground to suppose the property to be stolen, and the seizure must be openly made and the proceedings had without delay.

"Art. 18.17. Disposition of abandoned or unclaimed property

"(a) All unclaimed or abandoned personal property of every kind, except whiskey, wine and beer, seized by any state or county peace officer in the State of Texas which is not held as evidence to be used in any pending case and has not been ordered destroyed or returned to the person entitled to possession of the same by a magistrate, which shall remain unclaimed for a period of 30 days shall be delivered for sale to the purchasing agent of the county in which the property was seized. If the county has no purchasing agent, then such property shall be sold by the sheriff of the county.

"(b) The purchasing agent or sheriff of the county, as the case may be, shall mail a notice to the last known address of the owner of such property by certified mail. Such notice shall describe the property being held, give the name and address of the officer holding such property, and shall state that if the owner does not claim such property within six months from the date of the notice such property will be sold and the proceeds of such sale, after deducting the reasonable expense of keeping such property and the costs of the sale, placed in the county treasury.

"(c) If the owner of such property is unknown or if the address of the owner is unknown, then the purchasing agent or the sheriff, as the case may be, shall cause to be published once in a paper of general circulation in the county a notice containing a description of the property held, the name of the owner if known, the name and address of the officer holding such property, and a statement that if the owner does not claim such property within six months from the date of the publication such property will be sold and the proceeds of such sale, after deducting the reasonable expense of keeping such property and the costs of the sale, placed in the county treasury.

"(d) The sale of any property hereunder shall be preceded by a notice published once at least three weeks prior to the date of such sale in a newspaper of general circulation in the county where the sale is to take place, stating the description of the property, the names of the owner if known, and the date and place that such sale will occur. If the purchasing agent or sheriff, as the case may be, shall consider any bid as insufficient, he need not sell such property but may decline such bid and reoffer such property for sale.

"(e) The real owner of any property sold shall have the right to file a claim to the proceeds of such sale with the commissioners court of the county in which the sale took place. If the claim is allowed by the commissioners court, the county treasurer shall pay the owner such funds as were paid into the treasury of the county as proceeds of the sale. If the claim is denied by the commissioners court or if said court fails to act upon such claim within 90 days, the claimant may sue the county treasurer in a court of competent jurisdiction in the county, and upon sufficient proof of ownership, recover judgment against such county for the recovery of the proceeds of the sale.

"Art. 18.18. Disposition of gambling paraphernalia, prohibited weapon, criminal instrument

"(a) Following the final conviction of a person for possession of a gambling device or equipment, altered gambling equipment, or gambling paraphernalia, for an offense involving a criminal instrument, or an offense involving a prohibited weapon, the court entering the judgment of conviction shall order that the machine, device, gambling equipment or gambling paraphernalia, instrument, or weapon be destroyed or forfeited to the state. If forfeited, the court shall order the contraband delivered to the state, any political subdivision of the state, or to any state institution or agency. If gambling proceeds were seized, the court shall order them forfeited to the state and shall transmit them to the grand jury of the county in which they were seized for use in investigating alleged violations of the Penal Code, or to the state, any political subdivision of the state, or to any state institution or agency.

"(b) If there is no prosecution or conviction following seizure, the magistrate to whom the return was made shall notify in writing the person found in possession of the alleged gambling device or equipment, altered gambling equipment or gambling paraphernalia, gambling proceeds, prohibited weapon, or criminal

instrument to show cause why the property seized should not be destroyed or the proceeds forfeited.

"(c) The magistrate shall include in the notice a detailed description of the property seized and the total amount of alleged gambling proceeds; the name of the person found in possession; the address where the property or proceeds were seized; and the date and time of the seizure.

"(d) The magistrate shall send the notice by registered or certified mail, return receipt requested, to the person found in possession at the address where the property or proceeds were seized. If no one was found in possession, or the possessor's address is unknown, the magistrate shall post the notice on the courthouse door.

"(e) Any person interested in the alleged gambling device or equipment, altered gambling equipment or gambling paraphernalia, gambling proceeds, prohibited weapon, or criminal instrument seized must appear before the magistrate on the 20th day following the date the notice was mailed or posted. Failure to timely appear forfeits any interest the person may have in the property or proceeds seized, and no person after failing to timely appear may contest destruction or forfeiture.

"(f) If a person timely appears to show cause why the property or proceeds should not be destroyed or forfeited, the magistrate shall conduct a hearing on the issue and determine the nature of property or proceeds and the person's interest therein. Unless the person proves by a preponderance of the evidence that the property or proceeds is not gambling equipment, altered gambling equipment, gambling paraphernalia, gambling device, gambling proceeds, prohibited weapon, or criminal instrument, and that he is entitled to possession, the magistrate shall dispose of the property or proceeds in accordance with Paragraph (a) of this article.

"(g) For purposes of this article:

"(1) 'criminal instrument' has the meaning defined in the Penal Code;

"(2) 'gambling device or equipment, altered gambling equipment or gambling paraphernalia' has the meaning defined in the Penal Code;

"(3) 'prohibited weapon' has the meaning defined in the Penal Code.

"Art. 18.19. Disposition of certain weapons

"(a) Weapons seized in connection with an offense involving the use of a deadly weapon or an offense under Penal Code Chapter 46 shall be held by the law enforcement agency making the seizure, subject to the following provisions, unless:

"(1) the weapon is a prohibited weapon identified in Penal Code Chapter 46, in which event Article 18.18 of this code applies; or

"(2) the weapon is alleged to be stolen property, in which event Chapter 47 of this code applies.

"(b) When a weapon described in Paragraph (a) of this article is seized, and the seizure is not made pursuant to a search or arrest warrant, the person seizing the same shall prepare and deliver to a magistrate a written inventory of each weapon seized.

"(c) If there is no prosecution or conviction for an offense involving the weapon seized, the magistrate to whom the seizure was reported shall notify in writing the person found in possession that he is entitled to the weapon upon request to the court in which he was convicted. If the weapon is not requested within 60 days after notification, the magistrate may order the weapon destroyed or forfeited to the state for use by the law enforcement agency holding the weapon.

"(d) A person convicted under Penal Code Chapter 46 is entitled to the weapon seized upon request to the law enforcement agency holding the weapon. However, the court entering the judgment of conviction may order the weapon destroyed or forfeited to the state for use by the law enforcement agency holding the weapon if:

"(1) the person does not request the weapon within 60 days after his release from jail or the date of the judgment of conviction if he was not imprisoned; or

"(2) the person has been previously convicted under Penal Code Chapter 46; or

"(3) the weapon is one defined as a prohibited weapon under Penal Code Chapter 46.

"(e) If the person found in possession of a weapon is convicted of an offense involving the use of a deadly weapon or under Penal Code Chapter 46, the court entering judgment of conviction may order destruction of the weapon or forfeiture to the state for use by the law enforcement agency holding the weapon."

APPENDIX D

(REFERENCE: AMICUS CURIAE BRIEF AT PAGE 19,85)

Title 76 - Injunctions - (2) In Particular Cases, Articles 4664, 4665, 4666, and 4667, of Civil Statutes of Texas prior to January 1, 1974 amendments. . . . . D-1 and D-2

Articles 4664 and 4667, of Civil Statutes of Texas, as amended by Acts 1973, 63rd Leg, Ch. 399 Article 2 (H) and 2(I), effective January 1, 1974. . . . . D-3

2. IN PARTICULAR CASES

Art. 4664. Nuisance

Any hotel, rooming house or boarding house, country club, garage, rent car stand or other place to which the public commonly resort for board or lodging or commonly congregate for business or pleasure, where intoxicating liquors are kept, possessed, sold, manufactured, bartered or given away, or to which persons resort in assembling of two or more persons to the room for the purpose of drinking intoxicating liquor, or where intoxicating liquors are furnished to minors or to students of any educational institution, or where persons resort for the purpose of gambling, or for the purpose of prostitution, is hereby declared to be a common nuisance. Any person who knowingly maintains or assists in maintaining such a place is guilty of maintaining a nuisance. Acts 2nd C.S.1923, p. 57.

Art. 4665. Nuisance; evidence

Proof that any of said prohibited acts are frequently committed in any of said places shall be prima facie evidence that the proprietor knowingly permitted the same, and evidence that persons have been convicted of committing any said act in a hotel, boarding house or rooming house, is admissible to show knowledge on the part of the defendants that this law is being violated in the house. The original papers and judgments or certified copies thereof in such cases of convictions may be used in evidence in the suit for injunction and oral evidence is admissible to show that the offense for which said parties were convicted was committed in said house. Evidence of general reputation of said houses shall also be admissible to prove the existence of said nuisance. Id.

Art. 4666. Nuisance; prosecution

Whenever the Attorney General, or the district or county attorney has reliable information that such a nuisance exists, either of them shall file suit in the name of this State in the county where the nuisance is alleged to exist against whoever maintains such nuisance to abate and enjoin the same. If judgment be in favor of the State, then judgment shall be rendered abating said nuisance and enjoining the defendants from maintaining the same, and ordering that said house be closed for one year from the date of said judgment, unless the defendants in said suit, or the owner, tenant or lessee of said property make bond payable to the State at the county seat of the county where such nuisance is alleged to exist, in the penal sum of not less than one thousand nor more than five thousand dollars, with sufficient sureties to be approved by the judge trying the case, conditioned that the acts prohibited in this law shall not be done or permitted to be done in said house. On violation of any condition of such bond, the whole sum may be recovered as a penalty in the name and

Art. 4667. 4685-93 Gaming and disorderly houses

The habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof, for any of the following uses shall be enjoined at the suit of either the State or any citizen thereof:

1. For gaming or keeping or exhibiting games prohibited by law.

2. For keeping, being interested in, aiding or abetting the keeping of a bawdy or disorderly house, as those terms are defined in the Penal Code.

3. For carrying on bucket shops as defined in the Penal Code, or the habitual use by or permitting to remain in any such bucket shop, any telegraph or telephone wires or instruments, under circumstances prohibited by the Penal Code.

4. For the voluntary engaging in a fight between a man and a bull for money or other thing of value, or for any championship, or upon result of which any money or anything of value is bet or wagered, or to see which any admission fee is charged either directly or indirectly, as prohibited by the Penal Code.

Any person who may use or be about to use, or who may aid or abet another in the use of any such premises for any purpose mentioned in this Article may be made a party defendant in such suit. The Attorney General or any District or County Attorney may bring and prosecute all suits that either may deem necessary to enjoin such uses, and need not verify the petition; or any citizen of this State may sue in his own name and shall not be required to show that he is personally injured by the acts complained of. As amended Acts 1937, 45th Leg., p. 664, ch. 331, § 1.

2. IN PARTICULAR CASES

Art. 4664. Nuisance

Any hotel, rooming house or boarding house, country club, garage, rent car stand or other place to which the public commonly resort for board or lodging or commonly congregate for business or pleasure, where intoxicating liquors are kept, possessed, sold, manufactured, bartered or given away, or where intoxicating liquors are furnished to minors or to students of any educational institution, or where persons habitually resort for the purpose of prostitution or to gamble as prohibited by the Penal Code, is hereby declared to be a common nuisance. Any person who knowingly maintains such a place is guilty of maintaining a nuisance. Amended by Acts 1973, 63rd Leg., p. 988, ch. 399, § 2(I), eff. Jan. 1, 1974.

Art. 4667. 4685-93 Injunctions to abate public nuisances

(a) The habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof, for any of the following uses shall constitute a public nuisance and shall be enjoined at the suit of either the State or any citizen thereof:

(1) For gambling, gambling promotion, or communicating gambling information prohibited by law;

(2) For the promotion or aggravated promotion of prostitution, or compelling prostitution;

(3) For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material;

(4) For the commercial exhibition of live dances or exhibition which depicts real or simulated sexual intercourse or deviate sexual intercourse;

(5) For the voluntary engaging in a fight between a man and a bull for money or other thing of value, or for any championship, or upon result of which any money or anything of value is bet or wagered, or to see which any admission fee is charged either directly or indirectly, as prohibited by law.

(b) Any person who may use or be about to use, or who may be a party to the use of any such premises for any purpose mentioned in this Article may be made a party defendant in such suit. The Attorney General or any District or County Attorney or City Attorney may bring and prosecute all suits that either may deem necessary to enjoin such uses, and need not verify the petition; or any citizen of this State may sue in his own name and shall not be required to show that he is personally injured by the acts complained of.
Amended by Acts 1973, 63rd Leg., p. 989, ch. 399, § 2(J), eff. Jan. 1, 1974; Subsec. (b) amended by Acts 1975, 64th Leg., p. 1962, ch. 647, § 1, eff. June 19, 1975.

APPENDIX E

(REFERENCE: AMICUS CURIAE BRIEF AT PAGE 7,10,14,15,19,21)

Texas Penal Code, Article 527, sections 1-13, Obscene Articles - repealed by Acts 1973, 63rd Leg. Ch. 399, section 3, effective Jan 1, 1974. . . . . E-1 thru E-5

Art. 527. [509] Obscene articles

Definitions

Section 1. As used in this Article:

(A) "Obscene" material means material (a) the dominant theme of which, taken as a whole, appeals to a prurient interest; (b) which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) which is utterly without redeeming social value.

(B) "Prurient interest" means a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.

(C) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription, or mechanical, chemical or electrical reproduction, or any other articles, equipment, machines or materials.

(D) "Person" means any individual, partnership, firm, association, corporation or other legal entity, or any agent or servant thereof.

(E) "Distribute" means to transfer possession of, whether with or without consideration.

(F) "Knowingly" means having actual or constructive knowledge of the subject matter. A person shall be deemed to have constructive knowledge of the contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

Affirmative defense

Sec. 2. It is not innocent but calculated purveyance which is prohibited. This article shall not apply to persons who may possess or distribute obscene matter or participate in conduct otherwise prescribed by this article when such possession, distribution, or conduct occurs in the course of law enforcement activities or in the course of bona fide scientific, educational, or comparable research or study or in the course of employment as a moving picture machine operator, or assistant operator, in a motion picture theater in connection with a motion picture film or show exhibited in said theater if such operator or assistant operator has no financial interest in the motion picture theater wherein he is so employed other than his wages received or owed, or like circumstances of justification where the possession, distribution, or conduct is not limited to the subject matter's appeal to prurient interests.

General sale or distribution, etc., of obscene matter: penalty

Sec. 3. Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares for distribution, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

Distribution to minors; law governing

Sec. 4. Notwithstanding any of the provisions of this bill, the distribution of obscene matter to minors shall be governed by Senate Bill 661 [1] enacted by the 61st Legislature and approved by the Governor. In case of any conflict between the provisions of this bill and said Senate Bill 661, the provisions of the latter shall prevail.

[1] Acts 1969, 61st Leg., p. 850, ch. 284, §§ 1 to 16, classified as Vernon's Ann.P.C. art. 534b.

Hiring, employing, etc., minor to engage in acts described in Section 3: penalty

Sec. 5. Every person who, with knowledge that a person is a minor under 18 years of age, or who, while in possession of such facts that he should reasonably know that such person is a minor under 18 years of age, hires, employs, or uses such minor to do or assist in doing any of the acts described in Section 3, is guilty of a misdemeanor.

Conspiracy

Sec. 6. A conspiracy of two or more persons to commit any of the crimes prescribed by this Act is punishable as a felony. Any court having jurisdiction of the conspiracy crime has concurrent jurisdiction to try all misdemeanor crimes committed in furtherance of the conspiracy.

Special verdict

Sec. 7. The jury, or the court, if a jury trial is waived, shall render a general verdict, and must also render a special verdict as to whether the matter named in the charge is obscene. The special verdict or findings on the issue of obscenity may be: "We find the _____ (title or description of matter) to be obscene," or "We find the _____ (title or description of matter) not to be obscene," as they may find each item is or is not obscene. A special verdict shall not be admissible as evidence in any other proceeding, nor shall it be res judicata of any question in any other proceeding.

Punishment for violation of Sections 3, 5, and 6

Sec. 8. (A) Every person who violates Section 3 is punishable by a fine of not more than $1,000 plus $5 for each additional unit of material coming within the provisions of this Act, which is involved in the offense, not to exceed $10,000, or by confinement in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter, and which is involved in the offense, such basic maximum and additional days not to exceed 360 days in the county jail, or by both fine and confinement. If such person has previously been convicted of a violation of this Act, a violation of Section 3 is punishable as a felony and by a fine of not more than $2,000 plus $5 for each additional unit of material coming within the provisions of this Act, which is involved in the offense, not to exceed $25,000, or by imprisonment in the penitentiary for not exceeding five years or both fine and imprisonment.

(B) Every person who violates Section 5 is punishable by a fine of not more than $2,000 or by confinement in the county jail for not more than one year, or by both fine and confinement. If such person has been previously convicted of a violation of this Act, a violation of Section 5 is punishable as a felony and by a fine of not more than $5,000, or by imprisonment in the penitentiary not exceeding five years, or both fine and imprisonment.

(C) Every person who violates Section 6 is punishable by a fine of not more than $5,000, or by imprisonment in the penitentiary not exceeding five years, or by both such fine and imprisonment.

Search warrant for seizure of obscene material

Sec. 9. (a) An affidavit for a search warrant shall be filed with the magistrate describing the matter sought to be seized in detail. Where practical, the matter alleged to be obscene shall be attached to the affidavit for search warrant so as to afford the magistrate the opportunity to examine such material.

(b) Upon the filing of an affidavit for a search warrant, the magistrate shall determine, by examination of the matter sought to be seized, if attached, by an examination of the affidavit describing the matter, or by such other manner or means that he deems necessary, if probable cause exists for a hearing upon the question of the issuance of a search warrant. If the magistrate determines that probable cause exists for a hearing, he shall issue notice to the person or persons in possession of the matter, setting a time and place for a hearing to determine if a search warrant shall issue.

(c) The hearing on the affidavit for the issuance of a search warrant shall be at such time and upon such reasonable notice given in such manner as the magistrate may direct. The magistrate's order as to notice and hearing shall give the adverse party the right to appear and produce the matter described in the affidavit for a search warrant, but shall not in any manner require him to produce the said matter.

(d) The magistrate shall further have authority to render such orders as reasonable and necessary to protect the court's jurisdiction over the matter described in the affidavit for a search warrant and may issue orders requiring the matter not to be removed from its location as described in the application for a search warrant or to make any change, alteration or destruction of the matter until such time as a hearing has been conducted and the search warrant executed or the request therefor denied.

(e) Any person who has personal knowledge of the magistrate's order concerning the protection of the matter sought to be seized who knowingly disobeys the order and removes, changes, alters, or destroys the matter sought to be seized shall be guilty of a misdemeanor and shall be punished by fine of not more than $1,000 or by confinement in the county jail for not more than six months, or by both fine and confinement.

(f) At the time of the hearing on the issuance of a search warrant, the magistrate shall hear evidence concerning the obscenity of the matter and shall examine the matter or any copy of the same if produced in court, and shall afford any person in possession of the matter sought to be seized or claiming ownership of the matter an opportunity to be heard as to the obscenity or nonobscenity of the matter. At the close of the hearing the magistrate shall make a determination as to the obscenity or nonobscenity of the matter and shall determine if probable cause exists for the immediate issuance of a search warrant for its seizure.

(g) If the magistrate finds the matter to be obscene and that probable cause exists for the immediate issuance of a search warrant, then he shall issue a search warrant ordering the seizure of the matter described in the affidavit for a search warrant under the provisions of the Code of Criminal Procedure of Texas.

(h) In the event that a search warrant is issued and matter alleged to be obscene is seized under the provisions of this section, any person alleged to be in possession of the said matter or claiming ownership of the matter at the time of its possession or seizure may file a notice in writing with the magistrate within 10 days of the date of the seizure alleging that the matter is not obscene and the magistrate shall set a hearing within one day after request therefor, or at such time as the requesting party might agree, and at such hearing evidence may be presented as to the obscenity of the matter seized and at the conclusion of such additional hearing, the magistrate shall make a further determination as to the obscenity or nonobscenity of the matter. If at such hearing the magistrate finds the matter not to be obscene, then it shall be returned to the person or persons from whom it was seized.

(i) When a search warrant is issued under the provisions of this section, only that matter described in the complaint shall be seized by the executing peace officer or officers.

(j) Procedures under this section for the seizure of allegedly obscene matter shall be cumulative of all other lawful means of obtaining evidence as provided by the laws of this State. Nothing contained in this section shall prevent the obtaining of alleged obscene matter by purchase or under injunction proceedings as authorized by this Act or by any other statute of the State of Texas.

Destruction of matter or advertisement upon conviction of accused; seizure and disposition of personal property used to make, etc. obscene material

Sec. 10. Upon the conviction of the accused, the court may, when the conviction becomes final, order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the district attorney or any law enforcement agency, to be destroyed, and the court may cause to be destroyed any such material in its possession or under its control. In addition, the court may order the seizure of all tangible personal property of the accused which was used to make, print, show, or distribute the obscene material. The property shall be forfeited and disposed of as provided in Article 18.30, Code of Criminal Procedure, 1965, as amended.

Preparing, etc., obscene matter or advertising elsewhere for sale or distribution in this state: extradition

Sec. 11. Every person, whether or not he is a citizen of or present in this state, who knowingly prepares, publishes, or prints obscene matter for sale or distribution in this state, or who knowingly sends or causes to be sent into this state for sale or distribution any obscene matter or any advertising promoting the sale or distribution of obscene matter, shall be subject to the penalties of this Act, and the executive authority of this state shall demand extradition of such person from the executive authority of the state in which such person is found.

Policy (local regulation)

Sec. 12. No city, county or other political subdivision may enact any regulation of obscene material which conflicts with the provisions of this Act; however, a city, county, or other political subdivision is authorized to regulate further the means and manner of distribution and exhibition of matter.

Enforcement by injunction, etc.

Sec. 13. The district courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district, county, or city attorney within their respective jurisdictions, or the Attorney General to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this article. Such restraining orders or injunctions may issue to prevent any person from violating any of the provisions of this article. However, no restraining order or injunction shall issue except upon notice to the person sought to be enjoined. Such person shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial. In the event that a final order or judgment of injunction be entered against the person sought to be enjoined, such final order or judgment shall contain a provision directing the person to surrender to the sheriff of the county in which the action was brought any obscene matter in his possession and such sheriff shall be directed to seize and destroy such matter.

Amended by Acts 1943, 48th Leg., p. 38, ch. 35, § 1; Acts 1955, 54th Leg., p. 386, ch. 107, § 1; Acts 1957, 55th Leg., p. 425, ch. 203, § 1; Acts 1961, 57th Leg., p. 1041, ch. 461, § 1, eff. June 16, 1961; Acts 1969, 61st Leg., p. 1547, ch. 468, § 1, eff. June 10, 1969; Acts 1971, 62nd Leg., p. 2723, ch. 887, §§ 1 to 3, eff. Aug. 30, 1971; Acts 1971, 62nd Leg., p. 3406, ch. 1038, § 1, eff. June 17, 1971.

Section 3 of the amendatory Act of 1955 repealed all conflicting laws and parts of laws to the extent of such conflict. Section 4 provided that partial invalidity should not affect the remaining portions of the Act.

Section 2 of the amendatory Act of 1957 repealed all conflicting laws and parts of laws to extent of conflict only. Section 3 was a severability clause.

Acts 1969, 61st Leg., p. 1547, ch. 468, §§ 2, 3 provided:

"Sec. 2. Severability. If any provisions, clause, sentence, paragraph, section, phrase or part of this Act, or the application thereof to any person or circumstance, is held invalid, that invalidity shall not affect any other provisions, clauses, sentences, paragraphs, sections, phrases, parts or applications of this Act which can be given effect without the invalid provisions, clause, sentence, paragraph, section, phrase, part or application. To this end the provisions, clauses, sentences, paragraphs, sections, phrases and parts of this Act are declared to be severable.

"Sec. 3. Repeal and saving clause. All Acts and parts of Acts inconsistent or in conflict with this Act are, to the extent of their inconsistency or conflict, hereby repealed, expressly repealing Articles 526 and 527b. This section shall not be construed to affect any suits pending or rights existing or any liability or penalty incurred under those Acts at the time this Act shall take effect."

Art. 527a. Repealed by Acts 1967, 60th Leg., vol. 2, p. 2619, ch. 785, § 4, eff. Sept. 1, 1967

The repealed article, derived from Acts 1955, 54th Leg., p. 386, ch. 107, § 2, as amended by Acts 1955, 54th Leg., p. 1174, ch. 453, § 1, prohibited wholesale distributors from requiring retailers to purchase particular publications to obtain others.

See, now, V.T.C.A. Bus. & C. § 15.06.

Art. 527b. Repealed by Acts 1969, 61st Leg., p. 1547, ch. 468, § 3, eff. June 10, 1969

The repealed article prohibited display or sale of lewd or corruptive comic books, and was derived from Acts 1955, 54th Leg., p. 444, ch. 120. See, now, article 527.

APPENDIX F

(REFFERENCE: AMICUS CURIAE BRIEF AT PAGE 19)

Title 9, Chapter 43, Subchapter B - Obscenity (Article 43.21) of Texas Penal Code, as amended by Acts 1975, 64th Leg. p. 372, Ch. 163, section 1, effective September 1, 1975. . . . F-1

§ 43.21. Definitions

In this subchapter:

(1) "Obscene" means having as a whole a dominant theme that:

(A) appeals to the prurient interest of the average person applying contemporary community standards;

(B) depicts or describes sexual conduct in a patently offensive way; and

(C) lacks serious literary, artistic, political, or scientific value.

(2) "Material" means a book, magazine, newspaper, or other printed or written material; a picture, drawing, photograph, motion picture, or other pictorial representation; a play, dance, or performance; a statue or other figure; a recording, transcription, or mechanical, chemical, or electrical reproduction; or other article, equipment, or machine.

(3) "Prurient interest" means an interest in sexual conduct that goes substantially beyond customary limits of candor in description or representation of such conduct. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.

(4) "Distribute" means to transfer possession, whether with or without consideration.

(5) "Commercially distribute" means to transfer possession for valuable consideration.

(6) "Sexual conduct" means:

(A) any contact between any part of the genitals of one person and the mouth or anus of another person;

(B) any contact between the female sex organ and the male sex organ;

(C) any contact between a person's mouth or genitals and the anus or genitals of an animal or fowl; or

(D) patently offensive representations of masturbation or excretory functions.

Amended by Acts 1975, 64th Leg., p. 372, ch. 163, § 1, eff. Sept. 1, 1975.